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n109 Id. at 772-73 (noting that "First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests").

n110 Id. at 773.

n111 Id. at 774 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

n112 Id.

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The Court's decision was far from unanimous. Justice Stevens dissented, arguing that a content-neutral injunction should be reviewed under a more lenient standard than a content-neutral ordinance because such injunctions do not apply to the community as a whole but only to those engaged in wrongdoing. n113 In contrast, Justice Scalia, joined by Justices Kennedy and Thomas, argued that an injunction against a single group with shared views was at least as deserving of strict scrutiny as an explicitly content-based or viewpoint-based ordinance, primarily because such injunctions (1) readily lend themselves to suppression of particular ideas, (2) are the product of individual judges rather than legislatures, and (3) are a more powerful weapon than criminal penalties. n114 Arguing that "an injunction against speech [was] the very prototype of the greatest threat to First Amendment values, the prior restraint," Justice Scalia further chastised the majority for ignoring a substantial body of past precedent in which the Court "repeatedly struck down speech-restricting injunctions." n115 Indeed, Justice Scalia believed the majority's departure from First Amendment law to be so egregious that he flatly accused them of bowing to abortion politics:

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n113 Id. at 778 (Stevens, J., concurring in part and dissenting in part). Justice Stevens further would have upheld the 300-foot no approach zone as consistent with the First Amendment, primarily because the ban on "physically approaching" was at best a ban on mixed conduct and speech rather than pure speech. Id. at 780-82. Given earlier findings that protestors' conduct caused "higher levels of 'anxiety and hypertension' " in patients, thus increasing their medical risks, Justice Stevens found a ban on physical approaches imminently reasonable. Id. at 781.

n114 Id. at 792-96 (Scalia J., concurring in the judgment in part and dissenting in part). Justice Scalia argued that this particular injunction was actually aimed at suppressing a particular point of view. Id. at 792-93.

n115 Id. at 797 (citing this body of precedent).

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The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as

a candidate for summary reversal. But the context here is abortion . . . . Today the ad hoc nullification machine [of abortion] claims its latest, greatest, and most surprising victim: the First Amendment. n116

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n116 Id. at 785.

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B. Protestor Response and Social Context: Parallels to Dennis

Anti-abortion protestors and their supporters reacted to Madsen almost immediately. Prompted by the Court's new standard of review and its willingness to uphold any aspect of the injunction, the petitioners' attorney claimed that "[t]he court's decision today has retreated to the dark ages, when speech was permitted only at the discretion of government officials." n117 Echoing Justice Scalia's dissent, one of the petitioners declared that "[i]f I were pro-choice, I would be allowed to say anything, anywhere . . . . But as a pro-lifer, my rights have been trampled on." n118 Of course, such declarations are largely political tactics designed to arouse public sympathy. n119 They do not indicate that the Court actually acted based upon political motivations as it apparently did in Dennis. The danger in Madsen, however, is that the political and social context in which it arose lends an aura of credibility to the protestors' claims of political persecution.

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n117 Andrea D. Greene, Local Clinics Applaud High Court's Ruling on Abortion Protests, Hous. Chron., July 1, 1994, at 32 (quoting plaintiff's attorney, Mat Staver); see also Anthony Flint, Some Say Law Too Harsh on Abortion Foes, Boston Globe, Jan. 5, 1995, at 8 ("[C]hampions of free speech argue that abortion foes have been singled out for harsh legal treatment by liberals.").

n118 Crawford, supra note 13, at A1 (quoting petitioner Judy Madsen).

n119 As Professor Fish has noted, people frequently manipulate notions of free speech in order to advance political agendas: "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; and we give our preferred verbal behaviors that name when we can, when we have the power to do so, because in the rhetoric of American life, the label "free speech" is the one you want your favorites to wear. Free speech, in short, is not an independent value but a political prize. Stanley E. Fish, There's No Such Thing As Free Speech 102 (1994).

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As with the communists in Dennis, anti-abortion protestors were a largely unpopular group at the time of the Madsen decision-an unpopularity that was

twenty years in the making. Galvanized by the Supreme Court's landmark 1973 decision constitutionalizing a woman's right to choose abortion, n120 anti-abortion forces mounted a huge campaign to reverse its effects. n121 The movement initially focused on public education and political channels, engaging in tactics such as deluging the Supreme Court with protest letters, persuading legislators to introduce human life amendments, calling for civil disobedience against the Court's decisions, and flooding the court system with litigation. n122 Despite their widespread political efforts, the anti-abortion movement in these early years was largely unsuccessful. Although some legislatures passed laws significantly restricting women's access to abortion, the Supreme Court struck down almost all of them. n123 Moreover, the movement was unsuc- [*26] cessful in reducing the number of abortions n124 or in significantly changing public opinion regarding the abortion right. n125

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n120 Roe v. Wade, 410 U.S. 113 (1973).

n121 An organized anti-abortion movement appeared in the 1960s as states began to liberalize their laws restricting abortion. See Kristin Luker, Abortion and the Politics of Motherhood 127-37 (1984) (discussing anti-abortion movement prior to Roe). The rapid and significant change effected by Roe appears to have turned the nascent movement into a cohesive political force. See Dallas A. Blanchard, The Anti-Abortion Movement and the Rise of the Religious Right 28 (1994) (noting that "[c]oncerted opposition to abortion beyond the state level did not develop until shortly after" Roe); Laurence H. Tribe, Abortion: The Clash of Absolutes 143 (1990) ("Roe precipitated the real rise in the Catholic right-to-life movement.").

n122 Blanchard, supra note 121, at 32-33 (discussing letter-writing campaign and human rights amendments); Dennis J. Horan, et al., Abortion and the Constitution: Reversing Roe v. Wade Through the Courts 185-215 (1987) (generally discussing anti-abortion movement's use of litigation as strategic maneuver); Tribe, supra note 121, at 143 (discussing call for civil disobedience and Catholic Church's pressure on members to oppose the abortion right).

n123 With the exceptions of restrictions on abortion funding, see, e.g., Maher v. Roe, 432 U.S. 464 (1977), and regulations regarding minors seeking to obtain abortions, see, e.g., H.L. v. Matheson, 450 U.S. 398 (1981), the Court struck down most regulations of abortion procedures as violative of a woman's due process right. See Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 748 (1986) (striking down as unconstitutional statutory provisions requiring that women be advised of available medical assistance and of the "detrimental physical and psychological effects" of abortion, and that father be held responsible for financial assistance), overruled by Planned Parenthood v. Casey, 505 U.S. 833 (1992); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 417 (1983) (striking down statutory provisions (1) making blanket determination that all minors under age of 15 are too immature to make abortion decision and (2) requiring provision of lengthy and inflexible list of information to abortion candidate), overruled by Casey, 505 U.S. 833; Planned Parenthood v. Ashcroft, 462 U.S. 476 (1983) (holding unconstitutional a Missouri statute requiring abortion after 12 weeks of pregnancy to be performed in hospital); Planned Parenthood v. Danforth, 428 U.S. 52, 53 (1976) (holding "a blanket parental consent requirement" to be unconstitutional).

n124 Blanchard, supra note 121, at 54 ("Despite the efforts of [anti-abortion] groups, the number of abortions performed remained fairly constant at about 1.5 million per year.").

n125 Id. at 53; Mary Ann Glendon, Abortion and Divorce in Western Law 41 (1987).

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Becoming increasingly frustrated with these failures, anti-abortion forces began to focus on picketing and demonstrations in order to influence public opinion. These early (and largely peaceful) picketing efforts were also seemingly unhelpful to the anti-abortion cause. n126 Thus, protestors increasingly relied upon disruptive and often violent tactics in order to discourage women from obtaining abortions. From 1977 to 1993, over 1000 acts of violence were committed against abortion clinics, including bombings and arsons, death threats and assaults, hundreds of clinic invasions, n127 and several murders or attempted murders. n128 In that same period, anti-abortion protestors engaged in at least 6000 clinic blockades and related disruptions. n129 The protests in [*27] Madsen, then, were merely a small aspect of "a deliberate campaign to eliminate access [to abortion services] by closing clinics and intimidating doctors" across America. n130

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n126 Blanchard, supra note 121, at 53 ("As the picketing alone seemed to have little effect, many groups became more hostile and more assertive.").

n127 S. Rep. No. 103-117, at 3 (1993) (Senate Report from the Committee on Labor and Human Resources related to the Freedom of Access to Clinic Entrances Act (noting that 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, and 327 clinic invasions took place between 1977 and April 1993)); see also Tara K. Kelly, Silencing the Lambs: Restricting the First Amendment Rights of Abortion Clinic Protestors in Madsen v. Women's Health Center, 68 S. Cal. L. Rev. 427, 434-37 (1995) (discussing violent tactics used by abortion protestors). As early as 1985, 88% of the non-hospital facilities performing at least 400 abortions per year (i.e., facilities performing 75% of all abortions) experienced some type of harassment. Janice Mall, About Women: Harassment of Abortion Clinics Growing, L.A. Times, Apr. 26, 1987, pt. 6, at 8.

n128 In March of 1993, Dr. David Gunn, a physician who performed abortions, was shot and killed during an anti-abortion demonstration. S. Rep. No. 103-117, at 3 (1993). In August of that year, Rachelle Shannon attempted to kill an abortion physician in Wichita, Kansas. Robert Davis, Suspect Praised Earlier Abortion Shooting, USA Today, Aug. 23, 1993, at A3. Dr. George Patterson was killed in September, 1993 in Mobile, Alabama, and police suspected the culprit was a person opposed to his abortion work. Id. In the summer of 1994, Dr. John Bayard Britton and a volunteer escort were fatally shot by an abortion opponent in Pensacola, Florida. Henry Chu & Mike Clary, Doctor, Volunteer Slain Outside Abortion Clinic, L.A. Times, July 30, 1994, at A1. In December of 1994, John Salvi shot and killed two women in abortion clinics in Massachusetts. Elizabeth Mehren & John J. Goodman, 2 Killed, 5 Wounded in Shootings at 2 Abortion Clinics, L.A. Times, Dec. 31, 1994, at A1.

n129 S. Rep. No. 103-117, at 3 (1993).

n130 Id. at 11.

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Given the breadth and increasingly violent nature of their activity, the backlash against the protestors was almost inevitable. The public increasingly decried the actions of anti-abortion "zealots" and accused the protestors of engaging in guerilla warfare. n131 Polls showed that the majority of people strongly disapproved of anti-abortion protestors' tactics n132 and also favored restrictions on their rights. n133 Law enforcement officials had similarly short fuses with the protestors. Thus, as one researcher notes, "[w]here activities such as those of Operation Rescue [were] prolonged and vituperative, there [was] a tendency for local law enforcement officials to grow weary and to escalate the punishments meted out." n134 Cities also enacted ordinances with heightened punishments for persons "trespassing on the grounds of medical facilities," n135 ordinances specifically banning focused picketing, n136 [*28] and ordinances imposing criminal penalties upon protestors who refused to remain a certain distance away from clinics. n137 Even the federal government joined the rush to regulate abortion protestors, enacting the Freedom of Access to Clinic Entrances Act of 1993, which prohibits the use of force or threat of force to "intentionally injure[], intimidate[], or interfere[]" with a person attempting to obtain reproductive services. n138

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n131 Newspapers in the period preceding Madsen were rife with anti-protestor editorials, including several references to protestors as "zealots," "fanatics," "militants," and "terrorists." See, e.g., Abortion Clinics Need Protection, Seattle Post-Intelligencer, Nov. 24, 1993, at A10 (applauding federal law eliminating anti-abortion protest measures that amount to "raw intimidation of women"); Abortion Fanatic Tactics are Turning Public against Pro-Life Protestors' Cause, Cincinnati Enquirer, July 13, 1993, at A6 (referring to anti-abortion protestors as "fanatics" and "zealots"); Brian L. Finkel, "Bubble" Column Shows Myopia of a Zealot, Absolutism of a Despot, Ariz. Republic, Dec. 1, 1993, at B8 (referring to columnist who decried implementation of "safety zone" restriction as having the "myopia of a zealot"); Fortify Abortion Rights-Enact U.S. Law Against Violence, Intimidation, Buff. News, July 5, 1993, at B2 (referring to actions taken by Operation Rescue "zealots" in Buffalo and Amherst, Massachusetts); Protect Access to Clinics, USA Today, Nov. 18, 1993, at 14A (calling certain actions of anti-abortion protestors an "unbridled reign of terror").

n132 A 1991 Gallup poll taken during the blockade of clinics in Wichita, Kansas revealed that 77% of those polled disapproved of the anti-abortion protestors' tactics. Larry Hugick, "Pro-Life" Wichita Demonstrations Fail to Change Opinion on Abortion, The Gallup Poll Monthly, Sept. 1991, at 49.

n133 See, e.g., Sound Off-Most Callers Favor Court Restricting Abortion Protesters, Orlando Sentinel, Feb. 1, 1994, at A9 (noting that 2,237 of 3,861 people responding to poll favored Supreme Court restrictions on abortion protestors).

n134 Blanchard, supra note 121, at 92.

n135 Planned Parenthood Federation of America, Public Affairs Action Letter 4 (June 5, 1992) (noting city of Cincinnati's enactment of mandatory jail sentences for such persons).

n136 In 1985, as a direct response to anti-abortion protests outside of an abortion provider's residence, the town of Brookfield, Wisconsin enacted an ordinance prohibiting all "picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Frisby v. Schultz, 487 U.S. 474, 477 (1987). The Supreme Court eventually upheld the constitutionality of the ordinance. Id. at 488.

n137 The city of Boulder, Colorado, for example, enacted an ordinance prohibiting anyone leafleting or protesting on public property within 100 feet of any health care facility from "approach[ing] closer than eight feet from [the person they sought to influence], unless such [person gave] express oral consent to do so." Note, Too Close For Comfort: Protesting Outside Medical Facilities, 101 Harv. L. Rev. 1856, 1857 n.12 (1988). The city of Phoenix, Arizona enacted a similar ordinance. See Sabelko v. City of Phoenix, 68 F.3d 1169, 1170 (9th Cir. 1995), vacated, 117 S. Ct. 1077 (1997) (mem.).

n138 18 U.S.C. 248(a)(1) (1994). Although the Act speaks broadly in terms of "reproductive services," there is no question that it is aimed primarily at reversing problems caused by anti-abortion protestors. See, e.g., S. Rep. No. 103- 117, at 3-33 (1993) (discussing Act's necessity in light of history of violence and disruption caused by anti-abortion protestors).

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In addition, clinics and other abortion providers successfully enlisted the court system in their fight against the protestors' activities. Thus, clinics convinced some courts to impose massive fines against protestors under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), a federal statute designed to prevent patterns of racketeering activity. n139 Eventually, even the Supreme Court weighed in against the protestors by upholding the [*29] use of RICO against them, n140 although some of the justices expressed concern over the potential infringement on protestors' free speech rights. n141 In addition to seeking monetary awards, several clinics sought court orders enjoining protestors from engaging in violent and disruptive actions at clinics. Such lawsuits were largely successful in obtaining injunctions prohibiting violent and intimidating behavior and clinic blockades, n142 an unsurprising result given that invasive conduct such as trespass, vandalism and harassment are paradigm bases for injunctive relief. More importantly, however, clinics were able to persuade a number of courts to extend their injunctions to arguably peaceful anti-abortion protests, prohibiting, for example, even peaceful demonstrations or counseling within certain distances of clinic property. n143 As discussed above, Madsen fell into this category of cases.

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n139 See 18 U.S.C. 1961-68 (1994). Abortion clinics and their supporters successfully argued that the anti- abortion protestors' disruptive actions

were part of a "nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity including extortion" in violation of 1962(c). National Org. for Women v. Scheidler, 510 U.S. 249, 253 (1994); see also Northeast Women's Ctr., Inc. v. McMonagle, 868 F.2d 1342 (3d Cir. 1989). According to the clinics, the protestors "conspired to use threatened or actual force, violence, or fear to induce clinic employees, doctors, and patients to give up their jobs, give up their economic right to practice medicine, and give up their right to obtain medical services at the clinics." Scheidler, 510 U.S. at 253. As a result of such lawsuits, anti-abortion groups incurred massive fines, some totaling hundreds of thousands of dollars. See Blanchard, supra note 121, at 66, 94; Jan Crawford, Abortion Protestors Hit Legal Roadblock, Chi. Trib., Jan. 25, 1994, at 1 (noting that fines in RICO lawsuit against protestors could exceed $ 1 million).

n140 Scheidler, 510 U.S. at 262. In Scheidler, the Court ruled that no economic motive was required in order to use RICO against an organization otherwise falling within its parameters. Id. at 257. As a result, RICO remained available as a weapon against anti-abortion protestors even though they were political opponents, as opposed to commercial competitors, of the clinics. Scheidler's impact in this area is unclear, however, because of anti-abortion organizations' tendency to hide assets in the personal accounts of their members, see Karen Tumulty & Lynn Smith, Operation Rescue: Soldier in a "Holy War" on Abortion, L.A. Times, Mar. 17, 1989, at 1, or to dissolve and reorganize as new groups, see Blanchard, supra note 121, at 66, making it difficult to enforce collection of the fines. Nevertheless, juries are still finding against protestors charged with RICO violations. See David E. Rovella, NOW Abortion Victory Assailed, Nat'l L.J., May 4, 1998, at A6 (noting recent jury verdict imposing RICO fines on abortion protestors).

n141 See Scheidler, 510 U.S. at 265 (Souter, J., concurring) ("I think it prudent to notice that RICO actions could deter protected advocacy and to caution courts applying RICO to bear in mind the First Amendment interests that could be at stake.").

n142 See, e.g., New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1363-64 (2d Cir. 1989); Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc., 859 F.2d 681, 684, 687 (9th Cir. 1988); Planned Parenthood Ass'n of San Mateo v. Holy Angels Catholic Church, 765 F. Supp. 617 (N.D. Cal. 1991); Planned Parenthood League of Mass., Inc. v. Operation Rescue, 550 N.E.2d 1361 (Mass. 1990); Horizon Health Ctr. v. Felcissimo, 638 A.2d 1260 (N.J. 1994); Options v. Lawson, 670 A.2d 1081, 1082, 1087 (N.J. Super. Ct. App. Div. 1996).

n143 See, e.g., Portland Feminist Women's Health Ctr., 859 F.2d at 684 (enjoining demonstrations and distribution of literature); Holy Angels Catholic Church, 765 F. Supp. at 626 (prohibiting protestors from counseling and distributing literature); Horizon Health Ctr., 638 A.2d at 1264-65 (holding court had authority to enjoin "peaceful expressive activities"); Options, 670 A.2d at 1082, 1087 (same).

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Such was the position of the anti-abortion protestors as Madsen reached the Supreme Court. That is, at least one of the parties before the Court in Madsen

was a very public organization against [*30] which there was substantial public outcry and antipathy and against which numerous legislatures and judges had acted. This did not mean that the protestors were wholly without support in their beliefs. During this period at least fourteen percent of Americans believed that abortion should be completely outlawed while another forty- nine percent believed that it should be restricted in certain circumstances. n144 Furthermore, during the 1980s the President of the United States maintained substantial support for the anti-abortion cause. n145 Although the Supreme Court never went as far as overruling Roe, its rulings in the late 1980s and early 1990s generally upheld significant restrictions on the abortion right. n146 Nevertheless, abortion protestors (as opposed to abortion policy) were under attack n147 by the early 1990s, thus fueling their outcry when the Court used an admittedly new standard to uphold the injunction against them.

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n144 Hugick, supra note 132, at 49.

n145 See Tribe, supra note 121, at 161 (stating that after election of Ronald Reagan in 1980 "the pro-life movement had an avowed believer in the White House"). George Bush, who was elected President in 1988, also advanced the pro-life agenda while in office, supporting, for example, restrictive regulations on abortion counseling by recipients of federal funds. See Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 Colum. L. Rev. 1724, 1727-28 (1995) (discussing federal regulations in force during Bush administration).

n146 In Webster v. Reproductive Health Servs., 492 U.S. 490, 517-18 (1989), a plurality of the Supreme Court argued that Roe should be overturned. In Rust v. Sullivan, 500 U.S. 173, 192-93 (1991), a majority of the Court upheld viewpoint-based restrictions on abortion counseling at clinics which received federal subsidies. And in its most recent decision, Planned Parenthood v. Casey, 505 U.S. 833, 846-53 (1992) (joint opinion), the Court, while reaffirming the "essential holding" of Roe, appears to have at least impliedly acknowledged that the abortion right no longer has fundamental status. See also Wells, supra note 145, at 1755-58 (discussing how Casey Court diminished status of abortion right).

n147 This aspect of the abortion protest cases differs somewhat from the communist cases. Popular opposition to communists in the early and mid-20th century was closely entwined with opposition to their message. In contrast, many people support the anti-abortion platform although they oppose the protestors. Hugick, supra note 132, at 49 (discussing 1991 Gallup poll that revealed that 57% of those persons who favored repealing Roe nevertheless condemned protestors' behavior). Such a response is due less to viewpoint discrimination than to the generally held view that "collective [protest] . . . behavior [is] irrational, fickle, violent, undirected, and contagious." C. Edwin Baker, Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations, 78 Nw. U. L. Rev. 937, 981 (1983); see also Jerome H. Skolnick, The Politics of Protest 14-15 (1969) (discussing unpopularity of various protest movements). Nevertheless, both the communist and anti- abortion decisions arose in the midst of great antipathy toward speakers involved in controversial issues, thus lending credence to the speakers' claims that they were sacrificed for political reasons.

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Further aiding the protestors was the fact that the issue before the Madsen Court was not merely freedom of expression, but freedom of expressionabout abortion. As a citizenry, the abortion issue has consumed us: "We cannot stop legislating and adjudicating about it, or talking and writing about it, or imagining and even imaging it. Much like slavery before it, abortion has become an epic controversy in which the very soul of our disquiet republic seems capable of bursting." n148 To discuss "freedom of speech" in such a context is dangerous stuff, as evidenced by the frequency with which the abortion issue infected the discussion regarding protestors' rights. For example, those arguing in favor of injunctions frequently characterized the question as whether free speech rights or abortion rights should prevail, n149 even though the injunction in Madsen had implications well beyond the abortion context. n150 Such arguments could only fuel the Madsen protestors' claim that the emotional issue of abortion-as opposed to sound legal principles-was the real catalyst of the Court's decision. It may also have influenced even neutral observers' conclusions that Madsen somehow represented a loss of civil liberties. n151 In this sense, Madsen does parallel Dennis on at least some level. After Madsen, then, the logical question was whether the Court would stick by its new standard or would back away from its arguably political decision, just as the Yates Court eventually [*32] backed away from Dennis. Only three years after Madsen, Schenck presented the Court with an opportunity to reconsider the issue.

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n148 Jane Maslow Cohen, Comparison-Shopping in the Marketplace of Rights, 98 Yale L.J. 1235, 1236 (1989) (reviewing Glendon, supra note 125).

n149 See, e.g., Alan E. Brownstein, Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests- Section II, 29 U.C. Davis L. Rev. 1163, 1198-1200 (1996) (discussing difficulty of finding balance between free speech rights and abortion rights); Kelly, supra note 127, at 448-58 (same).

n150 At least some commentators noted that Madsen's decision to uphold portions of the injunction had significant implications for all protestors. See, e.g., Sean Patrick O'Rourke & Ron Manuto, Buffer Zone Protects a Basic Right . . . But Does It Rob Us of Another One?, Chi. Trib., July 28, 1994, at 19 ("[T]he Madsen opinion may indicate a new willingness to limit the place and manner in which protest may occur."); Jerry Zremski, High Court's Ruling Gives Judges More Power to Curb Protests, Buff. News, July 1, 1994, at A9 (noting that Madsen may have effect on "labor unions, animal-rights demonstrators and anyone else who might ever want to protest"); see also Darrin Alan Hostetler, Comment, Face-to-Face with the First Amendment: Schenck v. Pro-Choice Network and the Right to "Approach and Offer" in Abortion Clinic Protests, 50 Stan. L. Rev. 179, 181 (1997) (arguing that Supreme Court's approach to abortion clinic injunctions casts doubt on continuing validity of "important and time honored free speech and religion cases").

n151 See sources cited supra note 150.

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III. Schenck v. Pro-Choice Network

A. Legal Background

As in Madsen, the original Schenck injunction banned only violent and disruptive conduct rather than expression. n152 Also as in Madsen, the original injunction proved ineffective in preventing "constructive blockades" by protestors n153 or the devolution of even peaceful counseling attempts into harassment when the counselors became angered. n154 Thus, the district court amended the injunction to include a ban on demonstrating within fifteen feet of entrances and driveways of the medical facilities or around any person or vehicle entering or leaving the clinics. n155 While the order excepted from the fifteen-foot buffer zone sidewalk counseling of a non-threatening nature by no more than two people, it provided that sidewalk counselors were to "cease and desist" upon a person's indication that she did not wish to be counseled. n156

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n152 Pro-Choice Network v. Schenck, 67 F.3d 377, 382 (2d Cir. 1995) (en banc), aff'd in part, rev'd in part, 117 S. Ct. 855 (1997) (describing initial TRO as enjoining protestors from trespassing, blocking, or impeding access to clinic facilities, physically abusing or harassing people entering or leaving facilities, and making excessively loud noises which disturb, injure, or endanger the health of clinic patients and employees).

n153 Pro-Choice Network v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1423-24 (W.D.N.Y. 1992), aff'd in part, rev'd in part sub nom. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), vacated in part en banc, 67 F.3d 377 (2d Cir. 1995), aff'd in part, rev'd in part, 117 S. Ct. 855 (1997). According to the district court, the protestors, while not physically blockading the facilities, engaged in a "constructive blockade" by forcing patients and staff "to run a gauntlet of harassment and intimidation." Id. at 1424.

n154 Id. at 1425. The court noted that, while much of the counseling was peaceful, counselors often became angry and frustrated when patients nevertheless entered the clinics, and subsequently turned to "harassing, badgering, intimidating and yelling at the patients . . . even after the patients signal[led] their desire to be left alone. The 'sidewalk counselors' often crowd[ed] around patients, invade[d] their personal space and raise[d] their voices to a loud and disturbing level." Id.

n155 Id. at 1440 (paragraph 1(b) of preliminary injunction).

n156 Id. (paragraph 1(c) of preliminary injunction).

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In a two-to-one decision, a three-judge panel of the Second Circuit reversed the injunction with respect to the fifteen-foot buffer zone and sidewalk counseling provisions, holding that they [*33] violated Madsen's requirement that injunctions "burden no more speech than necessary." n157 The Second Circuit then granted a rehearing en banc and reversed the panel in a 13-2 decision, n158 though the judges attacked the issue from different perspectives. Judge Oakes, writing for the majority, applied Madsen and found that the injunctive provisions were sufficiently narrowly tailored to meet the government's interest in securing access to clinics and the safe performance of abortions. n159 In contrast, Judge Winter, in a separate opinion that also garnered a majority of the justices, argued that the injunction was justified primarily because the protestors' expressive activities were coercive in such a way as to take them out of the purview of the First Amendment altogether. n160 Finally, the two dissenters reiterated the belief expressed in their earlier panel opinion that the injunction was an unconstitutional restriction on free speech. n161

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n157 Schenck, 67 F.3d at 370-71. According to the panel, the buffer zone was invalid because there was no evidence that protestors' attempts to block access to the clinics were pervasive or successful. Id. Relying on that portion of Madsen which found the "no approach" zone unconstitutional, the panel further argued that the "cease and desist" provision violated the notion that "in public debate, our citizens must tolerate insulting, and even outrageous speech." Id. at 371-72 (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)).

n158 Id. at 377.

n159 Id. at 386-93. Judge Oakes noted that the "cease and desist" provision was also justified as necessary "to protect not only the right of access to abortions but, in effect, the physical well-being of women seeking such access and held captive by medical circumstance." Id. at 392 (internal quotation marks omitted). He further distinguished the "cease and desist" provision from the "no approach" provision in Madsen noting that the former was "far more solicitous of demonstrators' interests" because it allowed for face-to-face contact even without the express consent of the patient. Id. at 390-91.

n160 According to Judge Winter: [T]he First Amendment does not, in any context, protect coercive or obstructionist conduct that intimidates or physically prevents individuals from going about ordinary affairs . . . . [T]here is no right to invade the personal space of individuals going about [their] lawful business, to dog their footsteps or chase them down a street, to scream and gesticulate in their faces, or to do anything else that cannot fairly be described as an attempt at peaceful persuasion. Id. at 394-96 (Winter, J., concurring in the result). Characterizing the protest activities as coercive because they targeted specific individuals at certain difficult-to-leave locations, he would have ruled on that basis alone that the 15- foot buffer zone and "cease and desist" provisions were valid. Id. at 396-98.

n161 Id. at 401-03 (Meskill, J., dissenting). The dissenters especially eschewed the majority's use of privacy interests and the captive audience doctrine to support the "cease and desist" provision, noting that such interests rarely supported restrictions of speech in the public forum, and certainly did not support the provision in this instance. Id. at 405-06.

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[*34]

The Supreme Court, like Judge Oakes, engaged in a straightforward application of the principles enunciated in Madsen, focusing primarily on whether the fifteen-foot buffer zone burdened more speech than necessary. n162 Initially, the Court characterized the buffer zone slightly differently than did the lower courts. According to the Court, the buffer zone had "fixed" and "floating" aspects. n163 To the extent that the fifteen-foot zone extended around entrances and driveways, it was fixed (i.e., did not move), but to the extent that the fifteen-foot zone extended around people or vehicles seeking access to or leaving clinics, it floated (i.e., the zone actually moved with the persons or vehicles as they moved). n164 The Court concluded that these different aspects of the buffer zone required separate analysis.

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n162 The Court noted that the government interests at stake were essentially the same as those in Madsen-ensuring public order, promoting the free flow of traffic, protecting property rights, and protecting a woman's right to terminate her pregnancy. Schenck, 117 S. Ct. at 866. Given that such interests were "certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics," id., the only question was whether the injunction was appropriately tailored.

n163 Id. at 862.

n164 Id. at 864.

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The Court acknowledged the protestors' history of "abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct." n165 The majority nevertheless struck the floating buffer zone, fearing that its fluid nature would render protestors unable to comply without risking their safety. n166 It also noted the difficulty, if not impossibility, of compliance when several people simultaneously sought to enter or leave the clinics-a phenomenon that would render the floating zones completely amorphous. n167 The lack of certainty in terms of compliance led "to a substantial risk that much more speech [would] be burdened than the injunction by its terms prohib- [*35] it[ed]." n168 The Court did not, however, rule out all future attempts to separate protestors and others. Instead it emphasized that while the floating zone was unconstitutional, "some sort of zone of separation" between protestors and individuals seeking access to or leaving clinics might have been appropriate. n169

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n165 Id. at 867.

n166 Id. The Court noted that the buffer zones might force protestors into the street in order for them to walk alongside a person while maintaining a fifteen-foot buffer. Id.

n167 Id. According to the Court, protestors wishing to move in concert with an individual "are then faced with the problem of watching out for other individuals entering or leaving the clinic who are heading the opposite way from the individual they have targeted." Id.

n168 Id.

n169 See id. (stating that, because the zone could not be sustained on the record, its appropriateness in other circumstances need not be decided).

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In contrast to the floating buffer zones, the fixed buffer zones around clinic entrances survived scrutiny under Madsen because they were "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots [could] do so." n170 Specifically, the majority held that

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n170 Id. at 868.

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[b]ased on defendants' past conduct, the District Court was entitled to conclude that some of the defendants who were allowed within 5 to 10 feet of clinic entrances would not merely engage in stationary, nonobstructive demonstrations but would continue to do what they had done before: aggressively follow and crowd individuals right up to the clinic door and then refuse to move, or purposefully mill around parking lot entrances in an effort to impede or block the progress of cars. n171

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n171 Id. at 869.

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Moreover, the fixed zone carried with it none of the uncertainty that accompanied the floating buffer zones. Thus, the injunctive provision allowing fixed buffer zones burdened no more speech than necessary to ensure access to clinics.

The majority further found that the "cease and desist" provision survived constitutional scrutiny-at least insofar as it existed within the fixed buffer zones. n172 Though initially questioning the district court's basis for the provision (i.e., to protect the right of [*36] people seeking access to the facilities to be left alone), n173 the majority nonetheless upheld it as "an effort to enhance petitioners' speech rights" by allowing some protestors access to the buffer zone in order to express their message peacefully. n174 The Court further rejected petitioners' argument that the "cease and desist" provision was an illegitimate content-based regulation, noting that "counselors remain[ed] free to espouse their message outside the fifteen-foot buffer zone, and the condition on their freedom to espouse it within the buffer zone [was] the result of their own previous harassment and intimidation of patients." n175

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n172 See id. at 870 (holding that "cease and desist" exception for sidewalk counselors enhanced, rather than abridged free speech rights). The majority refused to comment on the constitutionality of the "cease and desist" provision insofar as it related to floating buffer zones because it found such zones to be unconstitutional. Id. at 868.

n173 Id. at 870. According to the Court, no such generalized right to privacy exists on public streets or sidewalks. Id.

n174 Id.

n175 Id.

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As in Madsen, Justice Scalia, joined by Justices Kennedy and Thomas, vigorously dissented. According to Justice Scalia, "no right to be free of unwelcome speech on the public streets while seeking entrance to or exit from abortion clinics" existed and an injunction based solely upon this interest was illegitimate. n176 He also took his colleagues to task for upholding the injunction even while recognizing that the "right to be left alone" was inconsistent with First Amendment principles, n177 characterizing the majority's actions as an illegitimate exercise of government power. n178 Such a substitution of government interests by a higher court was especially problematic in his view because the case involved a "trial court[] order imposing a prior restraint upon speech." n179

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n176 Id. at 871 (Scalia, J., concurring in part and dissenting in part). Justice Scalia believed that the buffer zone and "cease and desist" provisions were both based upon such a right. Id. at 871-72. He admitted, however, that the creation of buffer zones might have been constitutional absent the "cease and desist" provision because the district court had pointed partly to access problems to justify such zones. Id. at 871, 875.

n177 Id. at 872.

n178 Id. at 871-73.

n179 Id. at 873.

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B. protestor Response and Social Context: Parallels to Yates

Protestor response to Schenck was quite different than the response to Madsen. Rather than denounce the Court's decision to [*37] uphold portions of the injunction, protestors and their supporters lauded the Court's willingness to strike down the floating buffer zone as a recognition that "the 1st Amendment applies to the pro-life message, and [that] there is no longer an exception to the free-speech clause when the issue deals with abortion." n180 Some went as far as expressly characterizing the decision as a "change of heart" by the Court. n181 Even neutral observers, including free speech scholars, characterized Schenck as a strong affirmation of the rights of speakers to engage in "free speech of the loud, aggressive in-your-face variety" n182-a far cry from earlier characterizations of Madsen as "a loss for civil liberties . . . [giving] protestors a relatively low level of constitutional protection from injunctions." n183

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n180 Savage, supra note 16, at A1 (quoting Jay Sekulow, attorney for the protestors); see also A Better Balance on Protest Reversed an Earlier Restriction on Anti-abortion Protestors, Fresno Bee, Feb. 25, 1997, at B4 (noting that the Schenck Court "righted the delicate balance that must be maintained at the abortion clinic door").

n181 The Right to Protest, Indianapolis Star, Mar. 2, 1997, at C2.

n182 Savage, supra note 17, at A1; see also id. (quoting University of Southern California Law Professor Erwin Chemerinsky as stating "[t]his case establishes a strong [First] Amendment right to speak, even when the people say they don't want to be spoken to"); id. (quoting Professor Rodney Smolla of William and Mary Law School as noting that Schenck was a "strong affirmation of the in-your-face view of the [First] Amendment").

n183 William H. Freivogel, Center Court Four Justices Largely Shaped Decisions of Supreme Court During Its Recent Term, St. Louis Post-Dispatch, July 3, 1994, at B1; see also sources cited supra note 150.

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One could conclude that the Schenck Court, like the Yates Court before it, rectified an earlier, bad decision and restored the protestors' free speech rights. After all, though the Schenck Court purported to apply Madsen's principles, it struck down the floating buffer zone-easily the most

restrictive portion of the injunction against the protestors. n184 Perhaps this was the Schenck Court's way of gutting Madsen without actually overruling it, just as Yates did to Dennis. The social context in which Schenck was decided lends support to this characterization of the case. By the time the Court decided Schenck, violent and disruptive actions on the part of anti-abortion protestors apparently fell dramatically from all- [*38] time highs in 1992 and 1993, the years immediately preceding Madsen. n185 Moreover, anti-abortion forces made a conscious effort to mainstream themselves, publicly turning away from unpopular mass demonstrations and toward more traditional efforts, such as filling state and federal legislative positions with anti-abortion advocates. n186 By 1997, the public spotlight focused far less on abortion protestors than on a more traditional debate regarding abortion policy. n187 Just as anti-communist hysteria began to wane by the time of Yates, one could say that Schenck was decided in calmer times when the Court could see the error of its ways.

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n184 The floating buffer zone was more restrictive than the fixed buffer zone because, being tied to mobile persons, it potentially suppressed speech in a large area around the clinic. After Schenck, however, protestors were prohibited only from protesting within fifteen feet of clinic entrances and driveways, but they were allowed to approach anyone outside of those clearly defined areas.

n185 According to the National Abortion Federation, violent acts by abortion protestors fell from an all-time high of 437 incidents in 1993 to 111 incidents in 1996. National Abortion Federation, Incidents of Violence and Disruption Against Abortion Providers, 1998 (visited Sept. 22, 1998) <http://www.prochoice.org/violence/98vd.html>. Interestingly, although incidents of disruption declined in 1993-95 from an all- time 1992 high, they more than doubled in 1996. Id. Few newspapers reported this latter fact, cf. David J. Garrow, When 'Compromise' Means Caving In, Wash. Post, June 1, 1997, at C3 (discussing attacks on abortion clinics in 1997 and lack of newspaper coverage), choosing instead to focus on the decline in violent activities. See, e.g., Emily Bazar, Foes of Abortion Intend to Widen Their Audience, Sacramento Bee, Aug. 8, 1997, at A1; Julie Tamaki & Martha L. Willman, Abortion Clinic is Firebombed, L.A. Times, Mar. 8, 1997, at B1 (Valley Edition). This tendency by reporters to focus only on declining violence lent some credence to the protestors' claims that legislative action (primarily the Freedom of Access to Clinic Entrances Act of 1993) forced them to abandon much of their protest activity. Tamaki & Willman, supra (noting protestors' attribution of the decline in their activity to the 1993 Act).

n186 See Carey Goldberg, How Political Theater Lost Its Audience, N.Y. Times, Sept. 21, 1997, 4, at 6 (discussing Operation Rescue's "new tactic" of fielding seven candidates for congressional office). The protestors also planned to employ more peaceful, economic boycotts of corporations donating money to organizations such as Planned Parenthood. Bazar, supra note 185, at A1.

n187 In contrast to hearings regarding abortion violence held in 1993, see generally S. Rep. No. 103-117, supra note 127, the legislative battleground in 1997 focused on partial-birth abortion and international funding issues. See, e.g., Garrow, supra note 185, at C3 (discussing various federal legislative proposals regarding "partial-birth" abortion ban); John M. Goshko, Dispute Stalls U.S. Plan to Cut Its U.N. Dues, Wash. Post, Nov. 28, 1997, at A17

(discussing House of Representatives' refusal to approve bill providing funds for past U.N. dues because of dispute over funding for international family planning agencies who perform abortions or promote liberalized abortion laws).

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IV. The Abortion Protest Cases in the Context of Past Doctrine

The social context of Madsen and Schenck certainly lends some support to the protestors' claims. But what about the legal context? [*39] From a doctrinal standpoint do Madsen and Schenck parallel the Dennis/Yates pattern? In order to live up to such a claim, two issues are critical: First, Madsen must be inconsistent with past doctrine such that we view it as a political decision rather than a product of judicial reasoning. Second, Schenck must be inconsistent with Madsen in order to support the claim that it represents the Court's return to sound First Amendment principles. Ultimately, neither of these facts is true.

A. Placing Madsen in the First Amendment Framework

In upholding the convictions of the communist defendants, the Dennis plurality purported to apply past precedent, noting that the "clear and present danger" test had been applied to subversive advocacy cases since its 1919 decision in Schenck v. United States. Yet Chief Justice Vinson did not apply that test in any recognizable manner. Rather, he transformed a relatively strict test into a malleable balancing test and applied it in a manner to suit the "political exigencies" of the case. Madsen does not appear to follow such a pattern. While Dennis involved a scenario (criminal punishment of subversive advocacy) and a test that had been before the Court many times, the situation presented to the Madsen Court was relatively unique. The Court has previously faced both injunctions against speech and time, place, and manner regulations of speech. But prior to Madsen, it never faced an injunction placing a time, place, and manner restriction on speech. In light of this unique situation, the Madsen Court quite candidly announced a new standard. Though one may disagree with the standard applied in Madsen, the Court's approach is not the obvious manipulation of an existing standard as in Dennis.

There is also nothing in the Court's past doctrine regarding prior restraints, protestors, or content discrimination that necessitates a different result. Despite the protestors' intimations, n188 the Court's antipathy to prior restraints (i.e., those regulations that [*40] attempt to suppress expression in advance of publication) n189 does not compel a different outcome in Madsen. To be sure, the Court has found injunctions to be prior restraints. n190 Indeed, so many of the Court's significant prior restraint decisions involve injunctions that Professor Jeffries has noted that "despite its

original reference to official licensing, the doctrine of prior restraint today is understood by many people to mean chiefly a rule of special hostility to injunctions." n191 But any notion that all injunctions amount to prior restraints is purely a popular one. The Court has never issued such a broad ruling. On at least one occasion, it explicitly debunked such a notion. n192 Occasionally, the Court has [*41] even upheld the use of injunctions against expression. n193 Moreover, to the extent that the Court characterizes injunctions as prior restraints, it tends to do so because they involve bans on dissemination of information n194 or protest activity. n195 Given the Court's clear statement that "informed public opinion is the most potent of all restraints upon misgovernment," n196 suppression of information, even temporarily, n197 is something about which the Court is especially concerned. But Madsen involved a time, place, and manner regulation of protestors that still permitted them to speak within reasonably close proximity to their intended recipients. n198 The Madsen majority reasonably could have seen a difference between that regulation and previous injunctions. Finally, prior restraints are often disfavored because they require judges and administrators to assess the potential harm of speech prior to dissemination, thus allowing them potentially to overemphasize the risks of speech. n199 But the Madsen injunction issued after a history of (and as an attempt to prevent future) violence, disruption [*42] and harassment, making it far less likely that the trial court would exaggerate the risks involved-a factor the Court has previously noted in upholding some injunctions against expression. n200 Though one may disagree with the ultimate treatment of the injunction in Madsen, the Court's prior cases do not preclude the result.

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n188 The protestors' claim that Madsen signaled a retreat "to the dark ages when speech was permitted only at the discretion of government officials," Greene, supra note 117, at 32, intimates that Madsen somehow deviated from the Court's past prior restraint precedents.

n189 See, e.g., Alexander v. United States, 509 U.S. 544, 550 (1993) ("The term 'prior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' " (quoting Melville Nimmer, Nimmer on Freedom of Speech 4.03, at 4-14 (1984))). As Professor Emerson has noted, the primary importance of the prior restraint category is its distinction from subsequent punishment: "[A] system of prior restraint would prevent communication from occurring at all; a system of subsequent punishment allows the communication but imposes a penalty after the event." Thomas I. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648, 648 (1955). The Court has repeatedly stated that "[a]ny system of prior restraint of expression . . . bear[s] a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). Although the Court has stated that its hostility toward prior restraints "is not an absolute prohibition in all circumstances," Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976), its presumption against such restraints thus far has been insurmountable. See Marin Scordato, Distinction without a Difference: A Reappraisal of the Doctrine of Prior Restraint, 68 N.C. L. Rev. 1, 2 (1989) ("So strict is the scrutiny applied under the doctrine that the Supreme Court has never upheld a law that it has characterized as a prior restraint on pure speech.").

n190 See Nebraska Press, 427 U.S. at 539 (characterizing injunction prohibiting press from publishing inculpatory evidence pertaining to criminal defendant prior to jury impanelment as prior restraint); New York Times v. United States, 403 U.S. 713 (1971) (characterizing injunction against newspaper's publication of historical information pertaining to Vietnam War as prior restraint); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) (characterizing injunction against distribution of leaflets in particular community as prior restraint); Near v. Minnesota, 283 U.S. 697 (1931) (characterizing as prior restraint statute which allowed permanent injunction banning distribution of literature).

n191 John Calvin Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409, 426 (1983). The Court itself has referred to injunctions as "classic examples of prior restraints." Alexander, 509 U.S. at 550; Smith v. Daily Mail Pub'g Co., 443 U.S. 97, 103 (1979) (characterizing pretrial order barring publication of crime victim's name as "classic prior restraint").

n192 Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (noting that the Court "has never held that all injunctions are impermissible"); see also Keefe, 402 U.S. at 418-19 (implying that an injunction designed to remedy private wrongs rather than to suppress speech would have been permissible).

n193 See, e.g., Pittsburgh Press, 413 U.S. at 390; Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); National Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679 (1978).

n194 In New York Times, for example, the Court found unconstitutional a permanent ban on dissemination of the Pentagon Papers by the New York Times and the Washington Post. 403 U.S. at 713; see also Nebraska Press, 427 U.S. at 543 (overturning trial court order banning publication of defendant's confession until jury was empaneled); Keefe, 402 U.S. at 415 (reversing trial court order banning distribution of leaflets within city limits).

n195 See Carroll v. President and Comm'rs. of Princess Anne, 393 U.S. 175 (1968) (addressing ex parte order forbidding white supremacist organization from holding any rallies in the county for at least 10 days); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (addressing order that prohibited National Socialist Party of America from marching, parading or distributing any materials designed to incite or promote hatred against persons of the Jewish faith anywhere within village of Skokie, Illinois).

n196 Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

n197 As the Court has noted, the "element of time is not unimportant" to the effective dissemination of information. Nebraska Press, 427 U.S. at 561; see also Carroll, 393 U.S. at 182 (noting particular importance of timeliness in context of political rally).

n198 See Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 770 (1994) (noting that protestors could be "seen and heard" from abortion clinic parking lot).

n199 See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) ("The special vice of a prior restraint is that

communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment."); Vincent Blasi, Toward a Theory of Prior Restraint: The Central Linkage, 66 Minn. L. Rev. 11, 52-53 (1981) (discussing administrators' tendency to exaggerate risks of harm prior to occurrence of speech).

n200 See Pittsburgh Press, 413 U.S. at 390 ("Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication."); see also Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292 (1941) (upholding injunction of peaceful picketing because it was "enmeshed with contemporaneously violent conduct").

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Public response implying that Madsen somehow retreated from the Court's previous strong protection of protest activity similarly misses the mark. n201 Certainly, the Court has derailed numerous government attempts to suppress mass protests, n202 emphatically stating that they are "an exercise of . . . basic constitutional rights in their most pristine and classic form." n203 But the Court's primary concern in those decisions was the arbitrary use of a largely vague statute to suppress unpopular First Amendment activity. n204 It never implied that appropriate regulation of [*43] protestors was unacceptable. Rather, it explicitly noted that narrowly drawn statutes regulating protest activity were constitutionally permissible, n205 a notion that the Court's subsequent cases reinforce. n206 On the whole, the Madsen injunction's prohibitions were quite specific-to the point of giving exact distances regarding protest activity. n207 They thus gave little discretion to public officials while still allowing anti-abortion protestors to speak. The Madsen Court's willingness to uphold those aspects of the injunction is not clearly inconsistent with its past precedent regarding protestors. Moreover, to the extent that an injunctive provision apparently regulated protestors based on the offensiveness of their speech, n208 the Madsen majority struck it down-an action quite [*44] consistent with the Court's earlier concern regarding suppression of unpopular speech. Madsen is therefore not utterly out-of-line with the Court's past doctrine.

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n201 See supra notes 117-118 and accompanying text (discussing public response to Madsen).

n202 See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (reversing criminal convictions of nonviolent civil rights protestors); Gregory v. City of Chicago, 394 U.S. 111 (1969) (same); Cox v. Louisiana, 379 U.S. 536 (1965) (same); Edwards v. South Carolina, 372 U.S. 229 (1963) (same).

n203 Edwards, 372 U.S. at 235.

n204 The Court's earlier protest decisions arose out of mass demonstrations during the civil rights era and largely involved convictions of peaceful protestors under breach of the peace or disorderly conduct statutes. Such

statutes were frequently written in broad terms, prohibiting "a violation of public order, [or] a disturbance of the public tranquility, by any act or conduct inciting to violence." Edwards, 372 U.S. at 234 (describing South Carolina breach of peace law); see also Cox, 379 U.S. at 544 (citing Louisiana law). Convictions under such statutes raised the specter that the protestors were punished for expressing unpopular views. For example, the Edwards Court stated: These petitioners were convicted of an offense so generalized as to be . . . "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection. 372 U.S. at 237 (quoting Edwards v. State, 123 S.E.2d 247, 249 (S.C. 1961) rev'd sub nom Edwards v. South Carolina, 372 U.S. 229 (1963)); see also Cox, 379 U.S. at 551 (stating that evidence indicated only that student protestor views were opposed to the majority). Claiborne Hardware involved the imposition of civil damages and an injunction on civil rights protestors because of alleged violations of state common law. 458 U.S. at 890-92. Though recognizing that some of the protestors engaged in acts of violence, the Court ultimately overturned the trial court's verdict, noting that the evidence was "inadequate to assure the 'precision of regulation' demanded by [the First Amendment]." Id. at 921. In effect, the Court found that the lower court's findings were too ambiguous to ensure that only non-protected activity was affected-much like the flaw in the criminal statutes discussed above. Justice Scalia's cries notwithstanding, see Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 798 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part), Claiborne Hardware does not stand for the proposition that all injunctions against protestors are subject to strict scrutiny. Rather, the decision focused on the appropriateness of civil penalties based upon ambiguous evidence. The Court did ultimately strike down the injunction as well but almost as an afterthought. Claiborne Hardware, 458 U.S. at 924 n.67.

n205 See, e.g., Edwards, 372 U.S. at 236 ("We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they violated a law regulating traffic, or disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case.").

n206 United States v. Grace, 461 U.S. 171, 177 (1983) (concluding that "the government may enforce reasonable time, place, and manner regulations" on protests); Grayned v. City of Rockford, 408 U.S. 104, 119-20 (1972) (upholding regulation of protestors because it was "narrowly tailored . . . [a]nd . . . [gave] no license to punish anyone because of what he is saying").

n207 For example, the trial court's final order in Madsen prohibited demonstrating within 36 feet of clinic property as well as any unwanted approaches of persons seeking clinic services within 300 feet of clinic property. Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664, 669 (Fla. 1993) aff'd in part, rev'd in part sub nom. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994).

n208 See 512 U.S. at 773-74 (striking down 300-foot "no approach" zone as violating Court's oft-stated belief that "in public debate our own citizens must tolerate insulting, and even outrageous speech" (citation omitted)).

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Finally, the Court's past doctrine does not compel application of a different standard of review than that applied in Madsen. Typically, the Court distinguishes between content-based regulations (i.e., regulations that "limit communication because of the message it conveys") n209 and content-neutral regulations (i.e., regulations that affect speech but are not aimed at its content). n210 The Court sustains the former only if they survive strict scrutiny-the regulation must be narrowly drawn to serve a compelling state interest. n211 In contrast, the Court judges the latter under a more lenient, intermediate standard, sustaining such regulations if they "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." n212 Importantly, the Court's two-tiered approach evolved in cases where it considered the constitutionality of a generally applicable statute or ordinance. In such cases the Court could determine relatively easily the nature of the statute and apply the requisite standard of review. n213 Madsen, however, was the Court's first opportunity to [*45] apply content-discrimination principles to an injunction. n214 As the Madsen Court noted, the injunction before it was a bit of a hybrid-content-neutral but posing some danger of government abuse, a concern with content-based statutes. n215 To that extent, the Court decided to apply a hybridized standard somewhere between intermediate and strict scrutiny. n216 Such an application is far more honest than the Dennis Court's covert creation of a new standard.

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n209 Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 47 (1987).

n210 Two primary forms of such restrictions exist. First, laws may aim at expression, but may do so in a way that has nothing to do with the message conveyed (for example, a law banning the use of amplified sound trucks in private residential areas). Kovacs v. Cooper, 336 U.S. 77, 89 (1949). Second, laws may aim at regulating conduct but may have an incidental effect on expression (for example, a law banning the burning of draft cards). United States v. O'Brien, 391 U.S. 367, 370, 386 (1968).

n211 See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 395-96 (1992) (holding that ordinance prohibiting display of symbols known to "arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was unnecessary for protection of state's interest); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (holding that interest of New York's victims could not justify state's overly broad "Son of Sam" law).

n212 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

n213 Generally, the Court has looked to the face of the statute or to objectively determinable justifications for the statute in order to determine whether it is content-based or content-neutral. See O'Brien, 391 U.S. at 375

(finding that statute prohibiting burning of draft cards "does not abridge free speech on its face"); Police Dep't v. Mosley, 408 U.S. 92 (1972) (holding unconstitutional a city ordinance prohibiting all picketing within 150 feet of school except peaceful labor picketing). Occasionally, however, the Court finds it difficult to distinguish between such statutes; see, e.g., City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) (determining that facially content-based statute was content-neutral); see also infra notes 248-272 and accompanying text (discussing doctrinal inconsistencies in Court's approach to content-based and content- neutral statutes).

n214 Though the content-based/content-neutral distinction is one of the major organizing principles of the Court's current jurisprudence, see generally Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991), it evolved only in recent decades, essentially stemming from Mosley. Most of the Court's injunction cases were decided prior to the full establishment of this approach and were considered under either the prior restraint doctrine or other principles.

n215 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 764-65 (1994).

n216 See id. (finding that content-neutral injunction warrants more rigorous analysis than standard time, place, and manner analysis).

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One could argue that the Court should view an injunction which impacts only speakers with a particular viewpoint as content-based or viewpoint-based rather than content-neutral. Such an argument finds support in the Court's antipathy toward suppression of particular viewpoints. But the Madsen Court's refusal to take such a view also has support in the Court's past doctrine. The Madsen injunction was facially content-neutral, regulating only the procedural aspects of the expression rather than its content. The Court frequently concludes that a regulation is content-neutral and subject to lesser scrutiny on the basis of such facial neutrality. n217 Occasionally, the Court closely scrutinizes and strikes facially content-neutral regulations having a severely disparate impact on speakers. n218 Using lesser scrutiny, however, the Court often upholds content-neutral laws that admittedly have a disparate impact on speakers but that leave open opportunities to communi- [*46] cate. n219 Thus, the Madsen Court's refusal to strictly scrutinize the injunction simply because it had a disparate impact on protestors is not wholly inconsistent with past doctrine, especially given that the protestors were able to convey their message within reasonable proximity to their intended recipients.

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n217 See, e.g., O'Brien, 391 U.S. at 382 (finding that regulation prohibiting the burning of draft cards was content- neutral).

n218 See, e.g., Martin v. City of Struthers, 319 U.S. 141, 146 (1943) (striking down municipal ban on distribution of door-to-door circulars because method of distribution severely impacted poorly financed and unpopular causes).

n219 See, e.g., Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 654-55 (1981) (upholding restrictions on leafleting in walking areas of state fair); O'Brien, 391 U.S. at 389 (upholding restriction on knowingly destroying draft cards and finding that defendant could have conveyed message through alternative means).

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B. Placing Schenck in the Madsen Framework

Just as Madsen does not parallel Dennis, Schenck does not parallel Yates. The Court in Yates faced a scenario so close to Dennis that one of the Justices described the defendants as "engaged in this conspiracy with the [Dennis] defendants," and as "serv[ing] in the same army and engag[ing] in the same mission." n220 The Yates Court nevertheless reversed all of the defendants' convictions, but did not overrule Dennis. Rather, the Yates Court managed to gut the Court's earlier holding while purporting to apply its principles. Schenck simply does not follow this pattern.

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n220 Yates v. United States, 354 U.S. 298, 344-45 (1957) (Clark J., dissenting).

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Schenck and Madsen did involve similarly situated petitioners. Clearly, the protestors in both cases worked toward the same goal-the eradication of abortion services-and they used similar disruptive tactics to further that goal. In this sense, the Schenck and Madsen petitioners were "serving in the same army and engaging in the same mission" much like the communist defendants. But the Schenck Court's willingness to uphold portions of the injunction after applying Madsen's principles does not mean that the Schenck Court gutted the earlier decision. First, Madsen upheld a thirty-six-foot buffer zone while the Schenck Court refused to uphold a smaller, fifteen-foot buffer zone. But unlike the floating buffer zone struck down in Schenck, the Madsen thirty-six-foot buffer zone was fixed and did not pose the same problems with [*47] compliance or potential chilling of speech. n221 Second, in refusing to uphold the fifteen-foot floating buffer zone, the Schenck Court relied solely on the difficulty of compliance with that injunctive provision, finding that such difficulty violated Madsen's requirement that the injunction burden no more speech than necessary to serve a significant government interest. n222 The Court did not hold that protestors had a right to engage in aggressive or face-to-face protests. In fact, the Court suggested that a more narrowly tailored injunction creating "some sort of zone of separation" between protestors and individuals seeking access or egress from the clinic might have been appropriate. n223 Thus, to say that Schenck represents a retreat from Madsen is to ignore the facts in Schenck as well as what the Schenck Court said.

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n221 The Madsen buffer zone was tied to the property line surrounding the clinic, Madsen, 512 U.S. at 771, while the floating buffer zone in Schenck was tied to persons who were continually entering and leaving the clinics. Schenck v. Pro- Choice Network, 117 S. Ct. 855, 866-67 (1997). Moreover, the Schenck Court upheld a fixed buffer zone much like the one in Madsen. 117 S. Ct. at 868.

n222 See supra notes 166-168 and accompanying text (explaining the Schenck Court's reasons for striking down floating buffer zone).

n223 Schenck, 117 S. Ct. at 867.

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Finally, though the Yates Court purported to apply the earlier principles announced in Dennis, it did no such thing. Rather it manipulated the earlier test in Dennis, which focused on the gravity of the evil presented by a communist conspiracy, into a test that focused mainly on whether the communist defendants had expressly advocated the violent overthrow of the government. That is, Yates obviously changed the focus of the Dennis test though it refused to admit to doing so. Instead of changing the focus of Madsen, Schenck examined and applied Madsen's principles in excruciating detail. In fact, the Schenck Court was willing to uphold most of the challenged portions of the injunction after an application of the earlier decision. Thus, it is difficult to conclude that Schenck somehow diminished the Madsen standard. This is especially true when one considers the Schenck Court.'s willingness to uphold the "cease and desist" provision when the Madsen Court struck a similar provision. n224 If anything, the Schenck Court went further than Madsen in upholding restrictions against speech.

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n224 Madsen struck down the 300-foot "no approach" zone, claiming it violated the Court's previous decisions refusing to protect people from offensive speech. 512 U.S. at 774.

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V. Supreme Court Complicity in Protestor Mischaracterizations

Though Madsen and Schenck do not parallel the doctrinal aspects of the earlier communist decisions, the Court is not wholly without fault regarding protestor manipulation of the abortion protest decisions. Indeed, the majority opinions n225 in Madsen and Schenck are spectacular examples of the Court's tendency to ignore theoretical principles and to default to supportive rhetoric or precedent while ignoring contradictory or ambiguous language and decisions. Such a tactic allowed the dissenting Justices and the protestors to accuse those in the majority of manipulation, thus detracting from the legitimacy of its

decisions. Nowhere is this manner of response more evident than in Madsen's discussion of the prior restraint doctrine and the problem of motive in content-discrimination, and Schenck's discussion of the "cease and desist" provision.

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n225 This is not to say that the dissenting opinions are models of theoretical reasoning. They are not. In fact, both dissents engage in many of the same tactics and rhetorical devices as the majority opinions. This discussion focuses on the majority opinions, however, because those are the opinions to which the public responded.

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A. Prior Restraint

Given the popular association of injunctions and prior restraints, n226 the Madsen petitioners' attempt to cast the injunction as a prior restraint was, if not a winning argument, certainly a logical one. Yet, the Madsen Court's response to that argument was so minimal-a single footnote-as to imply that it was almost frivolous. While acknowledging that "[p]rior restraints do often take the form of injunctions," citing New York Times v. United States n227 and Vance v. Universal Amusement Co., n228 the Madsen majority ruled that this particular injunction was not a prior restraint, noting that "[n]ot all injunctions which may incidentally affect expression . . . are 'prior restraints' as that term was used in [*49] New York Times Co. or Vance." n229 The Court further bolstered its rejection of the protestors' argument by briefly pointing out that the injunction was not content-based and that the petitioners were still free to disseminate their message outside of the thirty-six-foot buffer zone. n230

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n226 See supra note 191 and accompanying text (discussing popular understanding that doctrine of prior restraint is largely aimed at eradicating injunctions against speech).

n227 403 U.S. 713 (1971) (per curiam).

n228 445 U.S. 308 (1980).

n229 Madsen, 512 U.S. at 763 n.2.

n230 Id.

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Unfortunately, the majority's terse discussion raised more questions than it answered. Its allusion to New York Times and Vance was at the very least

unhelpful and, more probably, confusing. The per curiam opinion in New York Times consisted of barely ten sentences, simply stating in relevant part:

We granted certiorari in these cases in which the United States seeks to enjoin the New York Times and the Washington Post from publishing the contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy."

"Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." The Government "thus carries a heavy burden of showing justification for the imposition of such a restraint." . . . [The District Courts] held that the Government had not met that burden. We agree. n231

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n231 New York Times, 403 U.S. at 714 (citations omitted).

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The opinion contained absolutely no jurisprudential discussion of the factors necessary to make injunctions into prior restraints. The actual analysis in New York Times was so thin, it prompted one commentator to note that it did "not make any law at all, good or bad" and that on the issue of "whether injunctions against the press are permissible, . . . [New York Times] can supply no precedent." n232 Vance similarly sheds no light on the subject. It, like New York Times, contains little discussion of the characteris- [*50] tics of injunctions warranting the "prior restraint" label. n233 Moreover, Vance involved an injunction against the publication of obscenity, a situation in which the Court takes a particularly unique approach. n234 In fact, both cases reflect a broader problem with the Court's jurisprudence regarding prior restraints: rather than engage in meaningful analysis, the Court has more or less simply concluded that a particular judicial order was or was not a prior restraint without discussing the factors supporting its determination. n235 Thus, if the Madsen majority expected its reference to New York Times and Vance to explain its decision, it failed miserably. If anything, Madsen simply furthers the incoherence already associated with the prior restraint doctrine.

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n232 Peter Junger, Down Memory Lane: The Case of the Pentagon Papers, 23 Case W. Res. L. Rev. 3, 4-5 (1971).

n233 In Vance, a Texas statute allowed judges to issue injunctions barring all future displays of obscenity based upon a showing that obscene films were exhibited in the past. 445 U.S. at 311. According to the Court, the statutory scheme was invalid because it "authorize[d] prior restraints of indefinite duration on the exhibition of motion pictures that have not been finally adjudicated to be obscene." Id. at 316. This statement does not clarify

whether the injunction was a prior restraint because of its perpetual nature and imposition in advance of an obscenity determination or whether the injunction is a prior restraint that also happens to have those characteristics.

n234 Id. at 315-17. The Court has generally upheld injunctions against exhibition of obscene motion pictures as long as the government employs "a constitutionally acceptable standard for determining what is unprotected by the First Amendment" and "impose[s] no restraint . . . until after a full adversary proceeding and final judicial determination . . . that the materials were constitutionally unprotected." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 55 (1973). Much of the Court's reasoning in such cases stems from the fact that obscenity has no First Amendment value. Outside of the obscenity context, however, that certain speech may enjoy no First Amendment protection does not support the use of a prior restraint. Near v. Minnesota, 283 U.S. 697, 714 (1931) (holding that prior restraints are invalid even where speech regulated may be criminally punished); Jeffries, supra note 191, at 410 ("[S]peech that validly could be controlled by subsequent punishment nevertheless would be immune from regulation by prior restraint.").

n235 Professor Jeffries eloquently notes this failure in his statement that "the Court has yet to explain (at least in terms that I understand) what it is about an injunction that justifies this independent rule of constitutional disfavor." Jeffries, supra note 191, at 417. Other scholars also generally question the Court's determination that injunctions are prior restraints. See, e.g., William T. Mayton, Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine, 67 Cornell L. Rev. 245, 253 (1982) (arguing that prompt judicial review removes injunction from prior restraint doctrine); Martin H. Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53, 90 (1984) (arguing that injunctions pose no greater harm to First Amendment interests than does subsequent punishment); Scordato, supra note 189, at 15 (same).

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The Madsen Court's reference to the injunction's content-neutrality and limited nature, while apparently an attempt to [*51] explain when injunctions amount to prior restraints, is similarly problematic. To be sure, some of the Court's most significant cases overturning court orders under the prior restraint doctrine have involved content-based restrictions of speech. n236 But this does not clearly dispose of the issue. Prior to Madsen, the Court never explicitly required content discrimination as a predicate for a finding of prior restraint (which may explain the Madsen Court's failure to cite any precedent supporting this proposition). In fact, the Court occasionally has upheld content-based injunctions, sometimes without even discussing the prior restraint issue. n237 It also has found at least one facially content- neutral injunction to be invalid. n238 That the Court has not required content-discrimination as a basis for finding an injunction invalid does not mean that the Madsen majority could not reconcile its remark with earlier decisions, but it certainly did not.

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n236 See, e.g., New York Times, 403 U.S. 713 (order prohibiting publication of information regarding Vietnam War); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (order prohibiting publication of inculpatory information pertaining to criminal defendant).

n237 See, e.g., Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 390 (1973) (dismissing argument that order forbidding newspaper from classifying ads by reference to sex was prior restraint); National Soc'y of Prof'l Eng'rs. v. United States, 435 U.S. 679 (1978) (upholding, without discussion of prior restraint issue, an injunction prohibiting professional society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding among engineers was unethical). See generally The Supreme Court, 1993 Term-Leading Cases, 108 Harv. L. Rev. 139, 276 n.44 (1994) (commenting that Madsen's standard of review for content-neutral injunction was actually far more rigorous than standard applied to content-based injunction in Professional Engineers).

n238 In Keefe, one of the Court's most frequently cited prior restraint cases, the injunction at issue was facially content-neutral, simply forbidding certain persons "from passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the City of Westchester, Illinois." Organization for a Better Austin v. Keefe, 402 U.S. 415, 417 (1971). Nevertheless, the Court had no trouble finding that the injunction "so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights." Id. at 418.

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The Madsen Court's simple citation to past precedent with no explanation or attempt at reconciliation gave Justice Scalia, who believed that the injunction was obviously a prior restraint, n239 ample ammunition to support his claim that the majority allowed political issues to cloud its judgment regarding the injunction's [*52] constitutionality. n240 Justice Scalia's analysis was as thin as (if not thinner than) the majority's n241 but his long string citation to cases in which the Court previously struck down injunctions as prior restraints n242- cases that are not even mentioned by the majority-certainly gives one pause regarding the majority opinion's legitimacy on this point. Justice Scalia's pointed (and technically valid) comment noting that there was "no antecedent in [the Court's] cases" for the majority's distinction between content-based and content-neutral injunctions n243 further bolsters the sense that the majority engaged in sleight of hand in order to reach a politically popular decision. After all of this, is it any wonder that the protestors and others responded to Madsen as they did?

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n239 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 797 (1994) (Scalia, J., concurring in the judgment in part and dissenting in part) ("[A]n injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint.").

n240 Id. at 784-85.

n241 Aside from his long citation to certain cases, Justice Scalia did little more than parrot rhetoric regarding the Court's antipathy toward prior restraints. Id. at 797-98. With the exception of Milkwagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941), he also ignored other cases in which the Court upheld injunctions against speech. Moreover, Justice Scalia miscited at least one case, characterizing it as a prior restraint case when it was decided under preemption principles. Madsen, 512 U.S. at 799 (citing Youngdahl v. Rainfair, Inc., 355 U.S. 131, 139 (1957)).

n242 Madsen, 512 U.S. at 798 (Scalia, J., concurring in the judgment in part and dissenting in part).

n243 Id. at 797-98 n.3 ("[T]hat injunctions are not prior restraints (or at least not the nasty kind) if they restrain only speech in a certain area, or if the basis for their issuance is not content but prior unlawful conduct . . . has no antecedent in our cases.").

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B. The Issue of Motive in content-discrimination

In contrast to its discussion of the prior restraint argument, the Madsen majority engaged in a reasonably lengthy analysis of the protestors' argument that the injunction was impermissibly viewpoint-based. Ultimately, however, the majority's analysis of this issue suffered from a defect similar to its prior restraint analysis-a refusal to recognize or reconcile potentially conflicting precedents. Though acknowledging that the injunction affected only anti-abortion protestors, the Madsen majority rejected the petitioners' argument that it was necessarily viewpoint-based and, thus, deserving of strict scrutiny. Instead, viewing the lower court's "purpose as the threshold consideration," the majority concluded that the injunction was content-neutral because it was [*53] issued as a result of petitioners' past violent conduct rather than their message. n244 Recognizing, however, that even content-neutral injunctions carry greater risks of censorship and abuse than generally applicable ordinances, the majority created a new, slightly higher standard of review than that used for typical content-neutral restrictions. n245

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n244 Id. at 763-64.

n245 Id. at 764-65 (asking whether "challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest").

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Justice Scalia attacked the Court's new standard, arguing that the majority should have reviewed the injunction under strict scrutiny, the standard used

for content-based restrictions. He primarily disagreed with the majority's inquiry into the lower court's purpose in determining that the injunction was content-neutral and subject to lesser scrutiny:

"Our cases have consistently held that illicit legislative intent is not the sine qua non of a violation of the First Amendment." The vice of content-based legislation-what renders it deserving of strict scrutiny-is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes. n246

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n246 Id. at 794 (Scalia, J., concurring in the judgment in part and dissenting in part (quoting Simon & Schuster v. Members of N.Y. Crime Victims Bd., 502 U.S. 105, 117 (1991)).

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Because an "injunction, [even if content-neutral, lent] itself just as readily to the targeted suppression of particular ideas" as a content-based statute, Justice Scalia concluded that strict scrutiny was warranted. n247

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n247 Id. at 793.

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There is much in the Court's prior jurisprudence to support Justice Scalia's criticism. Some of the Court's seminal decisions refused to inquire into governmental purpose when determining a regulation's constitutionality. In Police Department v. Mosely, n248 the Court struck down as content-based an ordinance prohibiting all picketing except labor picketing near a school despite the city's admittedly neutral purpose of preventing violence by non-labor [*54] picketers. n249 Similarly, the Court in United States v. O'Brien n250 emphatically declared legislative motive irrelevant and refused to apply a heightened standard of review to a facially content-neutral statute, even though the petitioner claimed that the statute was prompted by the legislature's desire to suppress anti- Vietnam protest. n251 Government purpose was not wholly irrelevant to the Court in these cases. In fact, the Court's treatment of content-neutral and content- based regulations is apparently a device with which it ferrets out illicit government purpose via the use of objective tests: n252 content-based laws, which are more likely to be based on an illicit government purpose such as censorship, are subject to strict scrutiny; in contrast, content-neutral laws, which generally have more neutral motives, are subject to lesser scrutiny. n253 Thus, government purpose is important to the Court. But rather than inquire into its actual existence, the Court more or less presumes that purpose depending upon the nature of the regulation and its potential for censorship.

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n248 408 U.S. 92 (1972).

n249 Id. at 101-02.

n250 391 U.S. 367 (1968).

n251 Id. at 382.

n252 See Ashutosh Bhagwat, Purpose Scrutiny in Constitutional Analysis, 85 Cal. L. Rev. 297, 362 (1997) (noting Court's concern with ferreting out improper motivation); Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996) (same); Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 227 (1983) (same); Kathleen M. Sullivan, Cheap Spirits, Cigarettes, and Free Speech: The Implications of 44 Liquormart, 1996 Sup. Ct. Rev. 123, 127 (same).

n253 See Kagan, supra note 252, at 451-56 (discussing function of Court's content-based/content-neutral distinction in ferreting out illicit motive); Stone, supra note 252, at 230 ("[T]he probability that an improper motivation has tainted a decision to restrict expression is far greater when the restriction is directed at a particular idea, viewpoint, or item of information than when it is content-neutral."); Wells, supra note 10, at 175 n.67 ("[While] the government obviously does not enact all content-based laws with improper motives, . . . the likelihood of such motives has led the Court to require compelling justifications for all content-based regulations.").

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The Madsen majority's statement that "purpose is the threshold consideration" is seemingly at odds with the Court's seminal decisions in this area. And the majority's willingness to examine the injunction under a lesser standard, despite its recognition that injunctions against protestors carry heightened risks of censorship and abuse, appears to conflict with its past approach. In this sense, the Madsen Court's treatment of the viewpoint-discrimina- [*55] tion issue may lend itself to claims that the Court bowed to politics and engaged in result-oriented decision-making.

The Madsen majority's approach, however, is not wholly without support. Though the Court's approach to governmental purpose is largely as described above, there exist cases, stemming mainly from the Court's decision in Renton v. Playtime Theatres, Inc., n254 in which the Court has inquired into governmental purpose. n255 In Renton, the Court found a facially content-based ordinance regulating the location of certain adult movie theaters n256 to be content-neutral because it was not prompted by the government's desire to regulate a particular message but by its desire to regulate certain "secondary effects" of the expression, such as crime or decreased property values. n257 In effect, the Renton Court inquired into the purpose underlying the statute rather than

looking to its face to determine whether it was content-based or content-neutral. Once the Renton Court determined the statute to be content-neutral, it effortlessly upheld it under intermediate scrutiny. n258 Renton thus provides some support for the Madsen Court's decision to look to government purpose in determining the content- neutrality of the injunction.

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n254 475 U.S. 41 (1986).

n255 Id. at 54.

n256 The ordinance prohibited any adult motion picture theater (defined as any theater emphasizing sexually explicit material) from locating within 1000 feet of any residential zone, church, or school. Id. at 44.

n257 Id. at 48-50. The ordinance apparently was "designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of the [the city's] neighborhoods, commercial districts, and the quality of urban life.' " Id. at 48 (quoting ordinance).

n258 Id. at 50-54.

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Unfortunately, reliance on Renton to explain the Madsen Court's actions may simply exacerbate the problems in the latter opinion. Numerous scholars argued that Renton's inquiry into governmental purpose was highly inconsistent with the Court's previous method of determining content-neutral and content-based regulations. n259 [*56] They further expressed the fear that Renton ultimately would result in the demise of the Court's stringent review of content-based regulations n260 and would "allow an easy path to censorship." n261 The Court's decision is also controversial among its own members. The Court has rarely relied on the secondary effects doctrine to support a decision. n262 More often, it finds a way to avoid using such reasoning. n263 Also, any time the majority discusses the doctrine as even potentially applicable, it does so over the strenuous objections of other Justices who argue that its "broad application may encourage widespread official censorship." n264 Renton is thus something of a pariah in terms of Supreme Court doctrine. To the extent that the Madsen majority relied on the protestors' violent conduct rather than on the terms of the injunction itself as proof of content-neutrality, its reasoning is similar to Renton and also may be suspect. n265

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n259 See Marc Rohr, Freedom of Speech After Justice Brennan, 23 Golden Gate U. L. Rev. 413, 452 (1993) (asserting that Renton is a "wholly unprecedented approach to the understanding of content-neutrality"); Stone, supra note 209, at 115 (noting that prior to Renton, the Court "in such circumstances ha[d] always invoked the stringent standards of content-based review"); Note, The Content Distinction in Free Speech Analysis After Renton, 102 Harv. L. Rev. 1904, 1908 (1989) ("Renton substantially revises first amendment doctrine."); see also

Renton, 475 U.S. at 56-57 (Brennan, J., dissenting) ("The fact that adult movie theaters may cause harmful 'secondary' land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral.").

n260 See, e.g., Laurence H. Tribe, American Constitutional Law 12-19, at 952 (2d ed. 1988) ("Carried to its logical conclusion, [the Renton] doctrine could gravely erode the first amendment's protections."); Stone, supra note 209, at 115-16 (describing decision as "disturbing, incoherent, and unsettling" and as threatening "to erode the coherence and predictability of first amendment doctrine"); Williams, supra note 214, at 631-35 (describing Renton as narrowing Court's focus regarding content discrimination).

n261 David L. Hudson, Jr., The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms," 37 Washburn L.J. 55, 93 (1997).

n262 See, e.g., Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citing Renton to support proposition that "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral").

n263 See, e.g., Reno v. ACLU, 117 S. Ct. 2327, 2342 (1997) (holding that purpose of Communications Decency Act of 1996 was to protect against primary, rather than secondary, effects of speech); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 430 (1993) (asserting that ban on distribution of commercial hand-bills on public sidewalks was not enacted to prevent secondary effects); R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (stating that ordinance prohibiting placement of burning cross on property as expression of fighting words "is not directed to secondary effects within the meaning of Renton"); Boos v. Barry, 485 U.S. 312, 320-21 (1988) (holding that law prohibiting display of signs at foreign embassy focuses on "direct impact speech has on its listeners," and not on secondary effects).

n264 Ward, 491 U.S. at 804 n.1 (Marshall, J., dissenting); see Boos, 485 U.S. at 336 (Brennan, J., concurring) (arguing that the doctrine "certainly exacerbates the risk that many laws designed to suppress disfavored speech will go undetected").

n265 Though Madsen did not discuss the secondary effects doctrine explicitly, the Madsen respondents-various abortion clinics-urged the Court to rely on the rationale in order to uphold the injunction. Brief for Respondents at 28-30, Madsen v. Women's Health Ctr., Inc. 512 U.S. 753 (1994) (No. 93- 880). In light of such urging, the majority's use of similar reasoning without an explicit discussion of Renton may further exacerbate illusions of political decision making.

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[*57]

To say that Renton is rarely invoked, however, is not to say that it did not have a lasting effect on the Court's doctrine. If anything, Renton created a doctrinal incoherence that likely led to the debate between the Madsen majority and dissent. While the Renton Court itself looked to the purpose underlying an ordinance, it also specifically chastised the lower court for doing so. The lower court ruled the ordinance unconstitutional because it found that a

desire to restrict the theaters' exercise of their First Amendment rights was "a motivating factor" behind the ordinance. n266 The Renton Court found the lower court's imputation of illicit motive unwarranted, observing that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." n267

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n266 Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986).

n267 Id. at 48 (quoting United States v. O'Brien, 391 U.S. 366, 383 (1968)).

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To be sure, there is a difference between the purpose inquiries by the Renton Court and the lower court. The lower court essentially engaged in conjecture regarding the potential illicit motive behind the ordinance. The difficulty in ferreting out such conjecture is precisely what the O'Brien Court was trying to avoid. n268 The Renton majority, on the other hand, merely looked to the reasons proffered by the city in order to determine the nature of the statute, thus avoiding such prophesizing. n269 Unfortunately, though this distinction may have been important to the Renton Court, it did not explicitly say so. The Renton Court's unwillingness to explainits distinction has further confused later doctrine. As Professor Post notes:

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n268 O'Brien, 391 U.S. at 383-84; see also Post, supra note 19, at 1269 ("The project of assessing the blameworthiness of government purposes is afflicted with notorious difficulties. Courts tend to be skittish of the project because they are reluctant to point fingers of accusation. Problems of evidence and interpretation abound.") (citation omitted).

n269 According to the Court, the "ordinance by its terms [was] designed" to prevent certain secondary effects rather than to suppress speech. 475 U.S. at 48 (emphasis added). After the initial lawsuit in Renton was commenced, the city amended the ordinance to add an explanatory provision regarding the city's intent. 475 U.S. at 61 n.5 (Brennan, J., dissenting).

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There is a pervasive ambiguity as to whether courts are to assess the justification for a regulation (the reasons that can be adduced for its passage) or the motivation for a regulation (the actual psychological intentions of those who enacted it). These are very different inquiries, and yet the Court has persistently equivocated as to which it means to require. n270

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n270 Post, supra note 19, at 1268 (emphasis in original).

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Not knowing exactly what to do, subsequent decisions both use and eschew purpose analysis. Thus, purpose terminology occasionally creeps into the Court's free speech decisions-especially when the Court wants to uphold a content-neutral law. n271 Simultaneously, the Court has reiterated its belief that governmental purpose is irrelevant to determining a law's legitimacy-especially when it wants to strike down a law that discriminates against certain speech. n272 The ultimate fallout of such schizophrenia is Madsen, where both the majority and the dissent cite seemingly relevant precedents in order to support their arguments, thus making the decision seem completely political.

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n271 See, e.g., Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 647 (1994) (noting that challenged provisions of Cable Television Consumer Protection and Competition Act were content- neutral because their "design and operation . . . confirm that the purposes underlying the enactment of the must-carry scheme are unrelated to the content of speech"); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("The principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The government's purpose is the controlling consideration.").

n272 See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (rejecting petitioners' argument that "discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas" and noting that past cases "have consistently held that illicit legislative intent is not the sine qua non of a violation of the First Amendment" (internal quotation marks omitted)); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (holding law unconstitutional even absent "evidence of an improper censorial motive").

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C. Ignoring the Cease and Desist Provision in Schenck-focusing on Minutiae at the Expense of Serious Discussion of Offensive Speech in the Public Forum

Protestors and neutral observers characterized Schenck as a victory for aggressive, "in-your-face" speech n273 even though the Schenck Court made no such pronouncement. That characterization of the Court's decision may simply be a wilful misunderstanding-a case of people hearing what they want to hear. But the Schenck majority's focus on minutiae likely facilitated such manipulation. Out of roughly twelve pages, the majority opinion spent almost five pages discussing the facts and lower court opinions, n274 one page discussing Madsen

and its test, n275 almost five pages analyzing the Schenck buffer zones under Madsen, n276 and barely one page discussing why the "cease and desist" provision survived constitutional scrutiny. n277 Thus, the bulk of the Court's analysis focuses on an explication of Madsen and its application to the buffer zones, of which almost two pages explain in detail the problems with the floating buffer zone and its resulting unconstitutionality. n278 In contrast, the Schenck majority "quickly refuted" the petitioners' challenge to the "cease and desist" provision, noting that it "was an effort to enhance petitioners' speech rights." n279 Given the Schenck majority's focus on the buffer zones, along with its relative dismissal of the challenge to the "cease and desist" provision, it is unsurprising that protestors looked upon the Court's decision to strike the most physically restrictive provision of the injunction as momentous.

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n273 See supra notes 180-183 and accompanying text (discussing reaction to Schenck).

n274 Schenck v. Pro-Choice Network, 117 S. Ct. 855, 859-64 (1997).

n275 Id. at 864-65.

n276 Id. at 865-69.

n277 Id. at 869-70.

n278 Id. at 866-68.

n279 Id. at 870.

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Ironically, the Court's discussion of the floating buffer zones was simply a straightforward application of Madsen's requirement that a content-neutral injunction "burden no more speech than necessary to serve a significant government interest." n280 That aspect [*60] of the decision broke no new ground-other thanto say that buffer zones cannot float. Indeed, it was relatively pedestrian. On the other hand, the Schenck Court's decision to uphold the "cease and desist" provision was momentous. Had the majority even minimally discussed that issue, the protestors and others might have realized what they potentially lost.

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n280 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 (1994).

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The Court has long held that certain public property, like the streets and sidewalks used by the anti-abortion protestors, must be held open for speech purposes. n281 The government cannot shut off communicative activity

altogether in such fora and the Court will strictly scrutinize content-based restrictions in them. n282 A fundamental aspect of the Court's jurisprudence in this area involves the notion that the government cannot regulate speech in the public forum simply because some people take offense to it: "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.' " n283 One could argue that the "cease and desist" provision violated these doctrinal tenets. The district court's order allowed persons entering or leaving the clinic to terminate even peaceful counseling sessions by indicating a desire for the counselors to leave the fifteen-foot buffer zone. n284 It is not unlikely that many of those entering or leaving the clinic would simply silence a counselor because they did not [*61] agree with or were offended by their anti-abortion message. n285 The district court's grounding of the provision partly in the right of persons entering and leaving the clinic to be free from unwanted speech further bolsters this conclusion. n286 In this light, the Schenck Court's refusal to examine the "cease and desist" provision in depth is odd-especially given its acknowledgment that the lower court's basis for the injunction was faulty. n287 Adding to the almost surreal nature of the Schenck Court's treatment of the "cease and desist" provision is the fact that Madsen struck down a similar provision prohibiting all uninvited approaches within 300 feet of the abortion clinic, primarily because it suppressed speech based upon its offensiveness. n288 Yet the Schenck Court barely attempted to reconcile its decision with Madsen. n289

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n281 See Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality decision) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens and discussing public questions.").

n282 See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (discussing standards of review to be applied to restrictions of speech in a public forum). A city may regulate speech in a public forum for content-neutral reasons, such as to keep public order. The Court reviews such restrictions of speech under intermediate scrutiny. Id.

n283 Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1987)); see also Texas v. Johnson, 491 U.S. 397 (1989) (holding that public display cannot be prohibited simply because society finds actions offensive); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) (finding that constitutional test for protected speech is not whether it is "sufficiently offensive to require protection for the unwilling listener"); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that criminal punishment of public display of four-letter expletive based upon its offensiveness was unconstitutional).

n284 Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1440 (citing paragraph 1(c) of the Schenck injunction), aff'd in part, rev'd in part sub nom. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), vacated in part en banc, 67 F.3d 377 (2d Cir. 1995), aff'd in part, rev'd in part, 117 S. Ct. 855 (1997).

n285 Petitioners made this exact argument regarding the "cease and desist" provision. Brief for Petitioners at 38- 44, Schenck v. Pro-Choice Network, 117 S. Ct. 855 (1997) (No. 95- 1065). See also Pro-Choice Network v. Schenck, 67 F.3d 359, 371- 72 (2d Cir. 1994) (striking down "cease and desist" order).

n286 Project Rescue, 799 F. Supp. at 1435-36.

n287 See Schenck, 117 S. Ct. at 870 ("We doubt that the District Court's reason for including that provision-'to protect the right of people approaching and entering the facilities to be left alone'-accurately reflects our First Amendment jurisprudence in this area.").

n288 Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994).

n289 The Court made a rather feeble attempt to reconcile its decision upholding the "cease and desist" provision with its decision in Madsen to strike down the "no approach" zone, noting that the injunctive provision in Madsen created a much larger zone than the fifteen-foot zone in Schenck and, thus, was far broader than necessary to ensure access to the clinic. Schenck, 117 S. Ct. at 870 n.12. That attempt, however, ignored that the Madsen Court found the access concerns intermixed with the issue of regulating offensive speech. Madsen, 512 U.S. at 774. The Madsen Court noted that it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful that contact may be . . . . "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.' " . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic. Id. (quoting Boos v. Barry, 485 U.S. 312, 322 (1988)). To say that the Schenck zone is constitutional merely because it is smaller is to ignore the offensive speech issue raised by the earlier decision.

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The Schenck Court's blithe treatment of the "cease and desist" provision raises two significant dangers. First, by giving that provision short shrift, the opinion gives a far greater sense of [*62] importance to the opinion's buffer zone analysis than it deserves. In this instance, public manipulation of the opinion by protestors and others was the ultimate result. Second, by upholding the "cease and desist" provision without engaging in any serious discussion of its potential inconsistency with past cases, the opinion opens itself up to future criticism that it ignored jurisprudential principles to reach a particular result. n290 Justice Scalia's outraged comment that "[t]he most important holding in today's opinion is tucked away in the seeming detail of the 'cease and desist' discussion in the penultimate paragraph of analysis" n291 portends such future censure. In either situation, the legitimacy of the Court's decision is undermined.

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n290 See, e.g., Sean Gillen, Case Note, The Supreme Court Drops the Buffered Ball and Ceases and Desists from a Tradition of Stare Decisis in Schenck v.

Pro-Choice Network, 31 Creighton L. Rev. 953, 995-96 (1998) (arguing that abortion politics caused Court to ignore jurisprudential principles in upholding "cease and desist" provision).

n291 Schenck, 117 S. Ct. at 871 (Scalia, J., concurring in part and dissenting in part).

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Conclusion

In fifty years will we look back on Madsen and Schenck as political decisions just as we do Dennis and Yates? Though the former cases do not fit the pattern of manipulation of the earlier communist decisions, the Court's willingness to default to convenient rhetoric and precedent in the abortion protest cases may ultimately cause just such a cynical response. Certainly, the protestors' comments regarding the cases have already started down that path. But more is at stake here than the ultimate viability of Madsen and Schenck. The Court's apparent inconsistency in decision-making undermines its legitimacy as an institution. As Professor Dworkin has noted:

Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation . . . . [J]udges must conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend one by one . . . . [*63] [They must form] some coherent principle whose influence then extends to the natural limits of its authority. n292

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n292 Robert Dworkin, Law's Empire 167, 169, 219 (1986); see also Alexander M. Bickel, The Least Dangerous Branch 69 (2d ed. 1986) ("[T]he Court must act rigorously on principle, else it undermines the justification for its power.").

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The need for coherence and legitimacy would seem to be especially true in the area of freedom of speech, one of our most celebrated liberties. Yet, to date, the Court has not explicitly "plunge[d into its First Amendment decisions] at the level of principle." n293 It is time that it did so. Though it likely will prove difficult to engage in such a task, it is not impossible. n294 As I have argued elsewhere, the overall structure of the Court's free speech jurisprudence-as opposed to its rhetoric-is already consistent with a philosophy of autonomy based upon the works of Immanuel Kant. n295 An explicit adoption of Kantian principles and further explication regarding how they propel current and future doctrine might allow the Court to climb out of its theoretical abyss.

n296 In [*64] turn, explicit application of such principles may explain and legitimize the Court's actions in Madsen and Schenck, including its decision to uphold the controversial "cease and desist" provision. n297 The manner in which the Court communicates and supports its decisions matters. Protestor response to Madsen and Schenck are but a preview of the future consequences of the Court's failure to realize this fact.

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n293 Kalven, supra note 2, at 3.

n294 For years, numerous theorists have proposed authoritative bases that they believe should or do govern the Court's First Amendment jurisprudence. See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Robert Post, Constitutional Domains (1995); C. Edwin Baker, Harm, Liberty, and Free Speech, 70 S. Cal. L. Rev. 979 (1997); Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591 (1982); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. Pa. L. Rev. 45 (1974).

n295 See Wells, supra note 10.

n296 Not all scholars agree that use of foundational principles to decide cases is necessary or even good. Professor Sunstein, for example, argues that "incompletely theorized agreements"-those in which people agree on a particular rule or outcome but disagree regarding its background justification-are a positive aspect of judicial decision-making. Cass R. Sunstein, Legal Reasoning and Political Conflict 35-44 (1996). While there may be advantages to such agreements in certain circumstances, problems arise in those instances in which we do not agree on a particular rule or outcome, as demonstrated in the communist and abortion protest cases. In the absence of agreement on the rule, lack of a coherent theory simply exacerbates public perception regarding the political nature of the Court's action. As Professor Fallon has noted: Despite the possibility of reasonable disagreement in constitutional law, we trust the Supreme Court to decide contested issues, largely on the ground that the Court's decisions will at least be disciplined by the demands of principle and by the requirement of articulate reason giving. . . . For the most part, it may be fair for the Court simply to presume that prior decisions have established doctrine that reasonably implements constitutional principles. But when the Court's majority declines a dissenting opinion's express challenge to justify its decision at a deeper level, it refuses to accept the full discipline of articulate justification that helps to support the legitimacy of judicial review. Richard H. Fallon, Jr., The Supreme Court, 1996 Term-Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 117 (1997).

n297 See generally Christina E. Wells, Bringing Coherence to the Law of Injunctions Against Expression (1998) (unpublished manuscript, on file with author).

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LEVEL 1 - 40 OF 96 ITEMS

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ARTICLE: REINVIGORATING AUTONOMY: FREEDOM AND RESPONSIBILITY IN THE SUPREME COURT'S FIRST AMENDMENT JURISPRUDENCE

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SUMMARY:
... Several influential scholars agree that individual autonomy -- the concept of people as rational, self-deliberating actors -- has been a driving force behind the Supreme Court's protection of speech and expression. ... Finally, Part IV discusses the implications of Kantian autonomy for hate speech regulation, specifically focusing on the Court's controversial decision in R.A.V. v. City of St. Paul. ... The conception of autonomy underlying the Court's free speech jurisprudence derives primarily from Immanuel Kant's moral and political philosophy. ... As Kant asks, "How much and how accurately would we think if we did not think, so to speak, in community with others to whom we communicate our thoughts and who communicate their thoughts to us[?]" Thus, we should protect those who publicly express themselves because of their contributions to the development of the rational capacities of both the speaker and her audience. ... First, I do not offer Kantian autonomy as a universal rationale explaining all of the Court's free speech jurisprudence. ... Moreover, explicit recognition of a relationship between Kantian autonomy and the Court's free speech jurisprudence might alleviate some of the Court's doctrinal and rhetorical inconsistencies. ... C. Kantian Autonomy and the Court's Free Speech Jurisprudence ...

TEXT:

[*159] Introduction

Several influential scholars agree that individual autonomy -- the concept of people as rational, self-deliberating actors -- has been a driving force behind the Supreme Court's protection of speech and expression. n1 A lively debate

has arisen, however, as to whether autonomy should underlie free speech jurisprudence. Some commentators favor the Court's approach, arguing that freedom from government censorship is critical to our development as individuals and our capacity for self-governance. n2 In contrast, other scholars contend that First Amendment jurisprudence should focus less on protecting individual autonomy. They argue that the Court should occasionally uphold government regulation of speech, especially [*160] regulation designed to remedy distortions in the current "marketplace of ideas" n3 or to otherwise "insure the richness of public debate." n4

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n1 See, e.g., CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 141 (1993) ("Principles of autonomy have an enduring and important role to play in the theory and practice of free expression."); Owen M. Fiss, Free Speech and Social Structure, 71 IOWA L. REV. 1405, 1409-10 (1986) ("The freedom of speech guaranteed by the first amendment amounts to a protection of autonomy -- it is the shield around the speaker.") (paraphrasing Harry Kalven) [hereinafter Fiss, Free Speech and Social Structure]; Charles Fried, The New First Amendment Jurisprudence: A Threat to Liberty, 59 U. CHI. L. REV. 225, 233-34 (1992) (noting that "freedom of expression is properly based on autonomy"); Robert C. Post, Racist Speech, Democracy, and the First Amendment, 32 WM. & MARY L. REV. 267, 279-80 (1991) (noting that the First Amendment is designed to protect democracy which is based on autonomous norms); David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334, 353-55 (1991) (arguing that the "persuasion principle" found throughout the Supreme Court's jurisprudence is based on autonomy). But see Geoffrey R. Stone, Autonomy and Distrust, 64 U. COLO. L. REV. 1171, 1172 (1993) (arguing that the Supreme Court's free speech jurisprudence "is much richer and more complex than the autonomy model would suggest").

n2 See, e.g., Fried, supra note 1, at 233 (noting that autonomy means that "the state has no claim to dominion over our minds: what we believe, what we are persuaded to believe, and (derivatively) what others may try to persuade us to believe"); Post, supra note 1, at 282 (arguing that "self-determination requires the maintenance of a structure of communication open to all").

n3 See SUNSTEIN, supra note 1, at 28-43 (arguing generally for regulation of speech in a manner similar to New Deal legislation); Owen M. Fiss, Why the State?, 100 HARV. L. REV. 781, 788 (1987) ("The state [should] . . . counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy.") [hereinafter Fiss, Why the State?].

Justice Holmes first alluded to the "marketplace of ideas" in his dissent in Abrams v. United States, noting "that the ultimate good desired is better reached by free trade in ideas -- the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Court has since used Holmes's rhetoric in several free speech cases. See FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 257-59 (1986); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534 (1980); Red Lion Broad., Co. v. FCC, 395 U.S. 367, 390 (1969).

n4 Fiss, Why the State?, supra note 3, at 791; see also Cass R. Sunstein, Free Speech Now, 59 U. CHI. L. REV. 255, 267 (1992) ("In some circumstances,

what seems to be government regulation of speech actually might promote free speech . . . .").

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The autonomy debate has raged in First Amendment scholarship in recent years, both generally and in specific contexts such as hate speech, n5 broadcast regulation, n6 and campaign finance reform, n7 and the debate is far from resolution. The intractability of the two sides is largely due to the impoverished notion of autonomy that dominates the debate. By grounding the Court's autonomy rationale in its antipathy toward content discrimination of speech, n8 the debate posits autonomy as personified by isolated and self-interested individuals acting with little or no regard for [*161] their community or the welfare of other individuals. The debate thus pits a rather unsympathetic version of autonomy against the needs of the community and the welfare of its citizens in a manner that is largely irresolvable.

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n5 See Charles R. Lawrence III, If. He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 434 ("At the center of the [hate speech] controversy is a tension between the constitutional values of free speech and equality."). Compare Fried, supra note 1, at 233-50 (arguing generally that the Court's focus on autonomy prevents regulation of hate speech) with SUNSTEIN, supra note 1, at 193 ("When speech helps to contribute to the creation of a caste system, the State can legitimately and neutrally attempt to respond . . . .").

n6 See, e.g., Fiss, Why the State?, supra note 3 (making anti-autonomy arguments in the context of broadcast regulation); Stephen A. Gardbaum, Broadcasting, Democracy, and the Market, 82 GEO. L.J. 373 (1993) (discussing autonomy rationale in context of broadcasting); R. Randall Rainey, The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media, 82 GEO. L.J. 269 (1993) (making anti-autonomy arguments in the context of broadcast regulation).

n7 See, e.g., SUNSTEIN, supra note 1, at 93-101 (arguing for regulation of campaign contributions and expenditures in order to promote political deliberation and equality); Lillian R. BeVier, Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, 73 CAL. L. REV. 1045, 1069-74 (1985) (questioning arguments that the State should be able to regulate campaign finances in the name of political equality). For a review of the relevant arguments regarding the First Amendment and campaign financing, see Lillian R. BeVier, Campaign Finance Reform: Specious Arguments, Intractable Dilemmas, 94 COLUM. L. REV. 1258, 1260-69 (1994).

n8 The Court's prohibition against content discrimination essentially forbids the government from suppressing speech based upon "the message it conveys." Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 47 (1987); see, e.g., Police Dep't of Chicago v. Mosely, 408 U.S. 92, 95 (1972); Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969). For a more thorough discussion of this principle, see infra Part III.A.

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A closer examination of the structure of the Court's free speech jurisprudence, however, reveals that it reflects a far richer and more complex concept of autonomy -- one based on the rights and responsibilities of personhood that is generally associated with Immanuel Kant. Autonomy in this sense is not about atomistic individuals but about social creatures entitled to respect for their dignity. In turn, members of society are responsible for respecting the dignity of others. As such, Kantian autonomy attempts to reconcile, rather than divorce, individuality and community. With this understanding of autonomy, we can reexamine the scholarly debate, in particular the still hotly contested issue of hate speech regulation. An analysis of free speech cases in light of Kantian autonomy refutes the assumption that the Court has elevated the speech rights of individuals over the needs of the community. On the contrary, the Court's jurisprudence attempts to reconcile individuality and community.

Part I of this Article explores the conception of autonomy that scholars have generally attributed to the Court and discusses problems with that conception. Part II sets forth an alternative, Kantian conception of autonomy and discusses its implications for a system of laws regulating free expression. Part III analyzes the Court's free speech jurisprudence and its autonomy rationale. It specifically examines both the Court's distinction between content-based and content-neutral regulations of speech n9 and its approach to low-value speech, n10 demonstrating that they reflect a Kantian notion of autonomy. Finally, Part IV discusses the implications of Kantian autonomy for hate speech regulation, specifically focusing on the Court's controversial decision in R.A.V. v. City of St. Paul. n11 This final Part demonstrates that a Kantian notion of autonomy may be able to bring people on both sides of the debate closer together regarding autonomy's place in the Court's free speech jurisprudence.

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n9 Content-based restrictions limit speech based upon its message. Content-neutral restrictions may impact speech but are not aimed at its content. The Court judges these regulations under different standards, applying strict scrutiny to content-based regulations while reviewing content-neutral regulations under a more lenient standard. For a more thorough discussion, see infra Part III.A.

n10 The Court has created several categories of speech that it considers to be of lesser value than other speech protected by the First Amendment. Such categories include: speech inciting unlawful action; fighting words; obscenity; libel; and commercial speech. Unlike high-value speech, the Court does not review regulations of low-value speech to determine whether they are content-based or content-neutral. Instead, the Court has developed tests unique to each category of low-value speech to determine whether regulations are constitutional.

n11 505 U.S. 377 (1992) (striking down St. Paul ordinance banning racially hateful fighting words). For a more thorough discussion of R.A.V., see infra Part IV.B.

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[*162] I. The Conception of Autonomy Emerging from the Scholarly Debate

A central issue in the autonomy debate has been whether the government's regulation of speech can improve the quality of public discourse. Scholars on both sides of the issue agree that the Court is antipathetic toward such regulation, and emphasizes that its current jurisprudence is particularly hostile toward government suppression of speech based upon its content. n12 Thus, the debate's focus is whether the Court's approach is defensible.

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n12 See, e.g., Fiss, Free Speech and Social Structure, supra note 1, at 1408-09 (noting that the Court's "rule against content regulation . . . stands as the cornerstone of the Free Speech Tradition"); Fried, supra note 1, at 233-34 (asserting that Court's First Amendment jurisprudence is hostile toward "impositions by government"); Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. REV. 1109, 1109 (1993) ("The Supreme Court has been largely hostile to this agenda, objecting to its tendency to achieve its purposes through the suppression of individual speech."); Strauss, supra note 1, at 334-35 (noting that the "persuasion principle," which "holds that the government may not suppress speech on the ground that the speech is likely to persuade people" has heavily influenced the Court's free speech jurisprudence); see also cases cited supra note 8.

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Scholars who generally favor n13 the Court's approach point out that our "status as rational sovereigns requires that [we] be free to judge for [ourselves] what is good and how [we] shall arrange [our] li[ves] . . . ." n14 Thus, the Court's hostility toward government suppression of speech is essential to preserve public discourse and, ultimately, our capacity for self-governance. n15 In contrast, scholars criticizing the Court's unrelenting antipathy toward government regulation of speech agree that it stems from a desire to protect autonomy, n16 but view the consequences negatively. According to these commentators, the Court's desire to erect a "shield around the speaker" n17 actually distorts public debate and undermines democracy, primarily by ignoring the fact that the State is not the only threat to speech. n18 They argue that in today's era of huge media corporations [*163] and social inequality, it is far too easy for politically or economically powerful speakers to corner the speech market, thereby distorting debate as much or more than any government regulation. n19 Instead of focusing on autonomy, which exalts the speaker's rights n20 and is consistently hostile to government regulations, these scholars conclude that we should view "the state not only as an enemy but also as a friend of speech . . . . When the state acts to enhance the quality of public debate, we should recognize its actions as consistent with the first amendment." n21

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n13 I use the term "generally favor" to indicate that these scholars tend to agree with the Court's antipathy toward suppression of speech based upon its content. That is not to say that they necessarily agree with every aspect of the Court's jurisprudence.

n14 Fried, supra note 1, at 233.

n15 See, e.g., id. at 233 (noting that autonomy does not "require, indeed self-respect forbids, that I cede to the state the authority to limit my use of my rational powers"); Post, supra note 12, at 1116 ("Censorship cuts off its victims from participation in the enterprise of autonomous self-government . . . ."); Strauss, supra note 1, at 356 (noting that "violations of the persuasion principle infringe human autonomy: they manipulate people by, in part, taking over their thinking processes . . . .").

n16 See, e.g., Fiss, Free Speech and Social Structure, supra note 1, at 1409-10.

n17 Id. at 1409.

n18 See, e.g., SUNSTEIN, supra note 1, at xix, 93 ("Autonomy, guaranteed as it is by law, may itself be an abridgement of the free speech right . . . . My special concern is that the First Amendment is sometimes used to undermine democracy."); Fiss, Free Speech and Social Structure, supra note 1, at 1409-13 (discussing generally tension between autonomy and rich public debate paradigms).

n19 See, e.g., Fiss, Why the State?, supra note 3, at 787-90 (noting that current public debate is dominated by large television networks and newspaper corporations who can ignore or silence particular viewpoints); Sunstein, supra note 4, at 270-72 (discussing various distortions of debate created by private actors). Professors Fiss and Sunstein use the broadcasting context to illustrate their belief that private actors are as much a threat to speech as are government actors. One can extend the argument, however, to any instance in which there is inequality of resources or social or political power. See Fiss, Free Speech and Social Structure, supra note 1, at 1410-12 (discussing problems that scarcity and social inequality pose for current free speech jurisprudence); see also Lawrence, supra note 5, at 466-72 (noting the problems that racism and unequal social power pose in the free speech context).

n20 See Fiss, Free Speech and Social Structure, supra note 1, at 1408-13 (arguing that the Court's jurisprudence exalts the liberty of the speaker over the collective self-determination of the community); see also Calvin R. Massey, Hate Speech, Cultural Diversity, and the Foundational Paradigms of Free Expression, 40 UCLA L. REV. 103, 115 (1992) (noting the "primacy of individualism" in much of the Court's free speech jurisprudence).

n21 Fiss, Free Speech and Social Structure, supra note 1, at 1416; see also SUNSTEIN, supra note 1, at xix (arguing that "government controls on the broadcast media, designed to ensure diversity of view and attention to public affairs, would help the system of free expression. Such controls could promote both political deliberation and political equality.").

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One of the most striking aspects of the debate is the conception of autonomy that underlies it. Both sides assume that the Court's hostility toward content discrimination is the best example of its concern for protection of autonomy. Autonomy in this sense translates into individual freedom from government interference. Moreover, once conceived of as a negative liberty, autonomy

becomes closely associated with speakers; as the debate is framed, autonomy in the Court's free speech jurisprudence means freedom of the speaker to say whatever she wants. n22 It is this [*164] characterization of autonomy that makes the debate so intractable. Labeling autonomy solely as the right of the speaker conjures up images of atomistic individuals saying whatever they wish with little regard for the needs of others. n23 Scholars thus associate autonomy with the lone speaker defending her right to shout racial epithets or the large corporation defending its right to donate huge sums of money to political candidates. Both invoke the label "freedom of speech" while ignoring the substantial emotional harm and distortion of public debate such speech can cause. Under the terms of the debate, one is forced to choose between being either pro-autonomy or pro-community. Society, and more importantly the Supreme Court, apparently cannot value both ideals.

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n22 Detractors of autonomy believe that it focuses too much on the speaker's rights. See, e.g., Fiss, Free Speech and Social Structure, supra note 1, at 1408-13. It is not as clear whether supporters of the Court believe that autonomy only involves the rights of speakers. Much of their rhetoric suggests that they view autonomy as the right to be free from government interference with our thought processes. See, e.g., Fried, supra note 1, at 233. Such a view of autonomy focuses not only on the speaker but also on the audience's right to hear information. Moreover, it is also unclear whether these scholars believe that the Court's conception of autonomy is listener-oriented. Professor Strauss, for example, puts forth his own audience-oriented version of autonomy. See generally Strauss, supra note 1. Yet he maintains that the Court's jurisprudence is currently "well suited to consider free speech issues when the claim to freedom of expression is based on the rights of the speaker." David A. Strauss, Rights and the System of Freedom of Expression, 1993 U. CHI. LEGAL F. 197, 198.

Ultimately, by concentrating on only one aspect of the Court's jurisprudence -- freedom from government interference with speech -- pro-autonomy scholars have at least allowed the debate to be labeled as one pitting the rights of speakers against the rights of others and the community. See, e.g., Gardbaum, supra note 6, at 381 ("In the First Amendment context, the value of autonomy tends to be equated (by its proponents and opponents alike) automatically and exclusively with the autonomy of speakers.").

n23 Criticism of the notion of autonomy as embodying selfish individualism is not limited to the free speech context. Rather, it has been the basis of a broader jurisprudential debate over the nature of liberal theory. See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-48 (1991) (criticizing the liberal image of the "rights-bearer as a self-determining, unencumbered individual, a being connected to others only by choice"); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 182 (1982) (criticizing the liberal notion of people as "unencumbered selves").

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But does the debate accurately portray the concept of autonomy reflected in the Court's free speech jurisprudence? Scholars are at least partially correct in locating an autonomy rationale in the Court's hostility toward government censorship. Their mistake, however, is focusing only on that aspect of the Court's jurisprudence. n24 In order to fully understand the Supreme Court's

conception of autonomy, one must examine the overall structure of the Court's jurisprudence, which encompasses not only the Court's principle against content discrimination but also its treatment of low-value speech. That examination reveals a richer and more complex notion of autonomy, one that focuses not only on freedom from government interference but also on private citizens' relationships with [*165] each other. This conception of autonomy is far removed from atomistic individualism. Instead, it recognizes that we are social beings with rights and responsibilities. This critical insight may provide a middle ground to the debate's otherwise rigid division between autonomy and community.

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n24 Scholars' emphases on the Court's prohibition against content discrimination is largely understandable. Over the last few decades the Court has paid increasing attention to its prohibition against content discrimination. See, e.g., Paul B. Stephan, The First Amendment and Content Discrimination, 68 VA. L. REV. 203, 204 (1982) ("Since its announcement [in 1972], the constitutional principle limiting the power of government to distinguish speech according to its content has played a significant role in the Supreme Court's decisions."); Stone, supra note 8, at 46 ("The content-based/content-neutral distinction plays a central role in contemporary first amendment jurisprudence."). Indeed, some of the Court's recent cases appear to make that principle the most important aspect of its jurisprudence. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that the government cannot engage in selective content discrimination against speech even if that speech was otherwise unprotected by the First Amendment); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

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II. Autonomy in Kant's Moral and Political Theory

The conception of autonomy underlying the Court's free speech jurisprudence derives primarily from Immanuel Kant's moral and political philosophy. I rely on Kant not only because he was "arguably the most important moral philosopher of the modern period" n25 but also because his "extraordinarily powerful [theory] . . . still seems to many thoughtful people to be an essentially correct view." n26 This Part discusses the major themes of Kant's philosophy and its general implications for a system of free expression. n27 Part III then discusses the Court's actual free speech jurisprudence and its relation to Kantian philosophy.

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n25 ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY xiii (1989).

n26 Id.

n27 A complete analysis of Kantian philosophy is beyond the scope of this Article. My modest aim here is to highlight Kant's key ideas, especially as they relate to autonomy.

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A. Kantian Theory

In the Kantian ethic, "every rational being exists as an end in himself." n28 Thus, Kant equates autonomy and personhood. Scholars interpret autonomy, in this sense, as less a right than a capacity of persons to "make and act on their own decisions." n29 Significantly, our innate autonomy (or freedom or dignity) n30 does not leave us entirely free to act to satisfy our desires. Rather, each individual's autonomy implies an obligation to respect the freedom of others and imposes responsibility when we fail to [*166] do so. n31 Kantian autonomy is considered to be a foundation for moral precepts -- in other words, what we ought to do given the innate dignity of all persons. Nevertheless, autonomy is not a concept limited to the moral realm. Instead, Kant's notion of autonomy has a significant place in his political theory, defining not only the role of the State but also the legal rights and obligations of citizens toward each other. n32

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n28 IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (Lewis W. Beck trans., Bobbs-Merrill 1959) [hereinafter KANT, FOUNDATIONS].

n29 Richard H. Fallon, Jr., Two Senses of Autonomy, 46 STAN. L. REV. 875, 878 (1994) [hereinafter Fallon, Autonomy]; see also JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 80 (1970) (noting that in Kantian theory "the worth of a rational being, and thus the worth of man, consists . . . in his autonomy from the course of mere phenomenal nature. For his dignity consists in his being a self-legislative member in a realm of ends."); SULLIVAN, supra note 25, at 235 (defining Kantian autonomy as "the ability and obligation of a person to act on rational principles of his or her own adoption").

n30 As one scholar has noted, "in Kant's moral theory it is usually possible to use the word 'autonomy' in place of 'freedom.' An autonomous person is one who judges and acts freely . . . by principles of reason alone." SULLIVAN, supra note 25, at 46. Similarly, Kant's philosophy tends to treat the concepts of autonomy and freedom as interchangeable with the concept of humans' inalienable dignity. See id. at 193-95 (discussing concepts of autonomy and dignity with respect to Kant's universal moral law). I also will use freedom, dignity, and autonomy interchangeably when discussing Kantian notions of autonomy.

n31 See KANT, FOUNDATIONS, supra note 28, at 49 (noting that our inherent freedom operates as "the supreme limiting condition on the freedom of the actions of each man"); see also Fallon, Autonomy, supra note 29, at 891 (noting that ascriptive Kantian autonomy "implies responsibility for harms voluntarily committed against others"); SULLIVAN, supra note 25, at 47 ("For Kant, the term 'autonomy' denotes our ability and responsibility to know what morality requires of us and our determination not to act immorally.").

According to Kant, all of our moral judgments must be universalizable: we must act in a way consistent with a moral law that we would apply to ourselves and not just others. Given that people are ends in themselves, morality requires that we act respectfully of the personhood or autonomy of all others. As Kant notes:

Now, I say, man and, in general, every rational being exists as an end in himself and not merely as a means to be arbitrarily used by this or that will . . . . Thus if there is to be a supreme principle and a categorical imperative for the human will, it must be one that forms an objective principle of the will from the conception of that which is necessarily an end for everyone because it is an end in itself. Hence this objective principle can serve as a universal practical law. The ground of this principle is: rational nature exists as an end in itself.

KANT, FOUNDATIONS, supra note 28, at 46-47. For a more thorough discussion of Kant's notion of universalization, see MURPHY, supra note 29, at 65-86.

n32 Some scholars disagree with the claim that autonomy underlies Kant's political theory. Professor Fletcher, for example, agrees that Kant's moral theory derives from notions of autonomy, see George P. Fletcher, Law and Morality: A Kantian Perspective, 87 COLUM. L. REV. 533, 541 (1987) (noting that Kant's moral theory is grounded in a concept of "absolute human worth"), but asserts that his political theory is not "an application and extension of [Kant's] moral concepts," id. at 553. Despite Professor Fletcher's interesting argument, I am persuaded by the weight of scholarship that treats both Kant's moral and political philosophy as stemming from the idea of autonomy. See, e.g., MURPHY, supra note 29, at 56 (stating that Kant's "'supreme principle of morality' . . . bears on the theory of right" which is the basis of his political philosophy); SULLIVAN, supra note 25, at 258-59 (arguing that Kant's "moral law appears . . . as the political Principle of Right"); Peter Benson, External Freedom According to Kant, 87 COLUM. L. REV. 559 (1987) (arguing generally that the notion of autonomy in Kant's moral theory also appears in his political theory); Ernest J. Weinrib, Law as Idea of Reason, in ESSAYS ON KANT'S POLITICAL PHILOSOPHY 15, 41 (Howard L. Williams ed., 1992) (noting that the "concept of right [in Kantian political theory] presupposes the equal status of free wills").

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According to Kant, the ultimate justification of the State is to protect the autonomy of its citizens. n33 As an initial matter, our innate autonomy [*167] surely limits the powers of the State against us; a government recognizing the autonomy of its citizens necessarily derives its authority from the rational consent of the governed. n34 Thus, the State has no power to coerce us to act consistently with its independent conception of what is right or good. Rather, its laws must respect our ability to deliberate and our capacity to choose. n35 Viewed in isolation, this aspect of Kantian theory seems to support the concept of autonomy emerging in the scholarly debate, which embodies only the right of individuals against the government. But Kant's political philosophy is not so one-sided.

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n33 See, e.g., IMMANUEL KANT, ON THE COMMON SAYING: 'THIS MAY BE TRUE IN THEORY, BUT IT DOES NOT APPLY IN PRACTICE', reprinted in KANT: POLITICAL WRITINGS 61, 74 (Hans Reiss ed. & H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) [hereinafter KANT, THEORY & PRACTICE] (discussing the "freedom of every member of society as a human being" as a foundation of the civil state); see also SULLIVAN, supra note 25, at 240 ("Kant's most significant contribution to the development of classical liberal theory . . . is his claim that the

justification of the state ultimately must rest on moral grounds, on the innate freedom of each person . . . .").

n34 See, e.g., IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), reprinted in KANT: POLITICAL WRITINGS, supra note 33, at 131, 139, 163 [hereinafter KANT, METAPHYSICS OF MORALS] ("The Supreme power originally rests with the people . . . . [Each citizen has the] lawful freedom to obey no law other than that to which he has given his consent."). Not surprisingly, Kant believed that the only moral government -- the only government recognizing the autonomy of its citizens -- was a republic. Id. at 163.

n35 Kant criticized a paternalistic government, even one that acts out of benevolence:

A government might be established on the principle of benevolence towards the people, like that of a father towards his children. Under such a paternal government . . . the subjects, as immature children who cannot distinguish what is truly useful or harmful to themselves, would be obliged to behave purely passively and to rely upon the judgement of the head of the state as to how they ought to be happy, and upon his kindness in willing their happiness at all. Such a government is the greatest conceivable despotism, i.e. a constitution which suspends the entire freedom of its subjects, who thenceforth have no rights whatsoever.

KANT, THEORY & PRACTICE, supra note 33, at 74; see also KANT, METAPHYSICS OF MORALS, supra note 34, at 161-62 (noting that autocratic government is most dangerous to free will and autonomy).

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Recognizing that the actions of autonomous individuals operating in a society can clash, Kant believed that the State could bring its coercive power n36 to bear against its citizens and thereby limit their freedom, in one, and only one, circumstance -- when some citizens' actions infringe upon the freedom of others, and coercion is necessary to preserve the others' autonomy. n37 Such coercive action by the State preserves the dignity of its citizens by ensuring that individuals act in a manner that respects the [*168] freedom of others. n38 Thus, the capacity for autonomy creates a moral entitlement that imposes an obligation, enforceable by the State, to respect the autonomy of other persons.

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n36 As used here, the term "coercive power" refers to both the State's power to define and punish illegal actions and its power to enforce civil obligations, such as contracts. Kant discusses both types of coercion throughout his political theory. See, e.g., KANT, METAPHYSICS OF MORALS, supra note 34, at 154-59 (discussing the right of criminal punishment); IMMANUEL KANT, THE PHILOSOPHY OF LAW 48 (W. Hastie trans., T. & T. Clark, Law Publishers 1887) (discussing enforcement of debt collection as based in the Principle of Right).

n37 See KANT, METAPHYSICS OF MORALS, supra note 34, at 134. Kant notes:

If a certain use to which freedom is put is itself a hindrance to freedom in accordance with universal laws (i.e., if it is contrary to right), any coercion which is used against it will be a hindrance to a hindrance of freedom, and

will thus be consonant with freedom in accordance with universal laws -- that is, it will be right. It thus follows by the law of contradiction that right entails the authority to apply coercion to anyone who infringes it.

Id. Importantly, only the State is entitled to use coercion to preserve freedom. Individuals are not so entitled. See, e.g., KANT, THEORY & PRACTICE, supra note 33, at 75 ("No-one can coerce anyone else other than through the public law and its executor, the head of the state . . . .").

n38 According to Kant, "every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else in accordance with a universal law is right." KANT, METAPHYSICS OF MORALS, supra note 34, at 133; see also KANT, THEORY & PRACTICE, supra note 33 at 75-76 ("All right consists solely in the restriction of the freedom of others, with the qualification that their freedom can co-exist with my freedom within the terms of a general law . . . ."). The "Principle of Right" is thus a slightly altered version of Kant's universal moral law. See supra note 31. It is the Principle of Right that permits the only acceptable State coercion against its citizens. See SULLIVAN, supra note 25, at 242 ("Such coercion, used to protect everyone's outer exercise of freedom equally by outlawing coercion by individuals, is the only permissible limitation on the freedom of the individual.").

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There is, however, a significant limitation on the State's ability to enforce this obligation. The State may protect our freedom from infringement by others, but only with respect to external actions and not with respect to the motives for such actions. n39 As Professor Roger Sullivan explains, the State may "constrain the citizens from violating the respect due others, but it cannot insist that they do so because they respect them." n40 This limitation is important because it implies a distinction between acceptable and unacceptable State uses of coercion. State coercion designed to preserve each citizen's autonomy from unwarranted interference comports with a general respect for the autonomy of all citizens. But coercion designed to bring internal motives in line with respect for such freedom imposes the State's view of what is right or good on its citizens. n41 [*169] Thus, our obligations to each other, while legally enforceable, are still tempered with the ability to believe what we wish.

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n39 Kant made clear that "the concept of right . . . applies only to those relationships between one person and another which are both external and practical." KANT, METAPHYSICS OF MORALS, supra note 34, at 132-33. Thus,

although [the] law imposes an obligation on me, it does not mean that I am in any way expected, far less required, to restrict my freedom myself to these conditions purely for the sake of this obligation. On the contrary, reason merely says that individual freedom is restricted in this way by virtue of the idea behind it . . . .

If it is not our intention to teach virtue, but only to state what is right, we may not and should not ourselves represent this law of right as a possible motive for actions.

Id. at 133-34. In this sense, Kant's Principle of Right is a slightly restricted version of his moral law which does concern itself with the motives for our actions.

n40 ROGER J. SULLIVAN, AN INTRODUCTION TO KANT'S ETHICS 24 (1994).

n41 Not only is any attempt to coerce our internal motives illegitimate, it is, as a practical matter, impossible. See IMMANUEL KANT, THE END OF ALL THINGS, reprinted in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 93, 102 (Ted Humphrey trans., Hackett Publishing Co. 1983) ("It is contradictory to command someone not only to do something but to do it willingly.").

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Viewing Kantian political theory as a whole, one sees a different view of autonomy than that which has emerged in the autonomy debate. Rather than focusing on autonomy as a right to be free from interference, Kant sees autonomy as an innate capacity of each person, which imposes obligations on us as members of an organized society. As such, Kantian autonomy is not the right of atomistic individuals working toward their own personal goals. Rather, autonomy recognizes that people are "inherently social being[s who] . . . live and move and have their being in a public forum." n42

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n42 Weinrib, supra note 32, at 41; see also SULLIVAN, supra note 25, at 260 (noting that Kantian theory "insists that we must think of our moral destiny as part of a larger whole encompassing first all our fellow citizens and then all mankind"); Jeremy Waldron, Kant's Legal Positivism, 109 HARV. L. REV. 1535, 1566 (1996) ("In the transition from [Kant's] moral philosophy to political philosophy, Kant insists that we must now appreciate that there are others in the world besides ourselves . . . .").

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B. Implications for a System of Free Expression

What would a system of laws designed to facilitate free expression look like if based upon a Kantian conception of autonomy? While Part III discusses many of the nuances of such a system as it exists in the Supreme Court's jurisprudence, a broad sketch of some of the more significant aspects of that system is appropriate here for a better understanding of its overall foundation.

As an initial matter, such a system would not focus on the rights of the speaker qua speaker but on the integrity of our thought processes as individuals and members of a community. Our thought processes are integral to our capacity for deliberation and self-governance. Ensuring their integrity is thus a necessary aspect of any system of laws built upon Kantian autonomy. Given that we develop our thought processes by communicating with others, and thereby develop our capacity for self-governance, protecting public expression is especially important. As Kant asks, "How much and how accurately would we think if we did not think, so to speak, in community with others to whom we communicate our thoughts and who communicate their thoughts to us[?]" n43 Thus, we should protect [*170] those who publicly express themselves because of

their contributions to the development of the rational capacities of both the speaker and her audience. n44

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n43 IMMANUEL KANT, WHAT IS ORIENTATION IN THINKING, reprinted in KANT: POLITICAL WRITINGS, supra note 33, at 237, 247; see also IMMANUEL KANT, AN ANSWER TO THE QUESTION: 'WHAT IS ENLIGHTENMENT?,' reprinted in KANT: POLITICAL WRITINGS, supra note 33, at 54, 55 (suggesting the need "to make public use of one's reason in all matters"); HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY 40 (Ronald Beiner ed., 1982) (noting that Kant "believed that the very faculty of thinking depends on its public use; without 'the test of free and open examination,' no thinking and no opinion-formation are possible. Reason is not made 'to isolate itself but to get into the community with others.'") (footnote omitted).

n44 See ARENDT, supra note 43, at 39 (noting that Kantian theory does not conceive of the right to speak as merely "the right of an individual to express himself and his opinion in order to be able to persuade others to share his viewpoint" but as a way to develop our reasoning abilities).

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Obviously, protection from overreaching state censorship is essential to the public exercise of our rational faculties. n45 A system of free expression based on Kantian autonomy, however, would not merely concern itself with protection against government suppression. Because the State's purpose is to preserve the dignity of its citizens, such a system would also ensure that citizens use speech consistently with autonomy. The State can and should regulate speech that, by attempting to override the thought processes of other individuals, disrespects their rational capacities. n46 Such speech does not facilitate, but rather detracts from, the public exercise of reason and is therefore the proper subject of the State's coercive powers.

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n45 Kant argued strongly for citizens' rights to express themselves, especially in matters critical of government. See, e.g., KANT, THEORY & PRACTICE, supra note 33, at 85 (noting that "freedom of the pen" is critical to safeguard the rights of citizens against the government) (emphasis omitted).

n46 I base this argument on Kant's moral and political theory, but it is, to some extent, my extension of his principles. Kant clearly argued against government suppression of speech, but his views on regulation of private coercive speech are less developed. Nevertheless, Kant's philosophy, especially his belief that laws permitting lying would make a just State impossible, supports regulation of such speech. See IMMANUEL KANT, ON A SUPPOSED RIGHT TO LIE FROM ALTRUISTIC MOTIVES, reprinted in CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS ON MORAL PHILOSOPHY 346 (Lewis W. Beck trans., Univ. of Chicago Press 1949).

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Determining when speech is coercive is no easy task. The task is made more difficult by the fact that the State must walk a fine line between regulating

the external and internal aspects of speech. The State must regulate speech because of the coercive impact it has on our thought processes, not because of any particular idea that is expressed. The ability to test ideas through public communication is a necessary aspect of autonomy; we cannot relinquish it to the State or any other person. Deeming speech coercive because the government or its citizens dislikes or finds harmful the ideas expressed imposes an orthodoxy and cuts off debate in an impermissible manner.

In sum, a system of free expression based on a Kantian notion of autonomy involves more than the freedom of the speaker to speak as she wishes. Rather, it involves the ability and responsibility of individuals, as part of a community, to engage in dialogue in order to develop their rational capacities.

[*171] III. Autonomy as Reflected in the Structure of the Supreme Court's Free Speech Jurisprudence

My argument that the Court's jurisprudence reflects an autonomy rationale is subject to a few important caveats. First, I do not offer Kantian autonomy as a universal rationale explaining all of the Court's free speech jurisprudence. Indeed, there are so many intricacies to free speech doctrine that identifying a completely unifying principle may be impossible. n47 Kantian autonomy, however, largely explains at least two of the major "organizing principles" n48 of the Court's jurisprudence: the Court's review of regulations for content discrimination and its designation of certain speech as low-value. n49 Moreover, Kantian autonomy can illuminate those areas of jurisprudence on which the scholarly debate has concentrated.

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n47 See HARRY KALVEN, JR., A WORTHY TRADITION 3 (1988) ("The Court has not fashioned a single, general theory which would explain all of its decisions . . . ."); Post, supra note 1, at 278 (noting that "first amendment doctrine . . . is a vast Sargasso Sea of drifting and entangling values, theories, rules, exceptions, predilections").

n48 The term "organizing principles" is Professor Williams's. See Susan H. Williams, Content Discrimination and the First Amendment, 139 U. PA. L. REV. 615, 616 (1991) (defining "organizing principles as the multi-doctrinal themes the Supreme Court has recently begun using to clarify and give structure to the confused 'doctrinal web' surrounding First Amendment jurisprudence").

n49 Professor Williams would add the Court's public forum doctrine as a third pervasive structure to the two listed in the text. See id. at 616 n.2. To be sure, the Court's public forum doctrine is a major tenet of its First Amendment jurisprudence. However, it adds little to the analysis in this Article. The public forum doctrine is primarily designed to ensure that speakers have access to public property while still maintaining reasonable administration of government activities occurring on that property. Thus, in public fora -- property such as streets and parks that have traditionally been open to speech activities -- the Court generally applies its other traditional speech analyses. In other words, the Court applies its content-based/content-neutral and low-value speech approaches to resolve freedom of speech issues. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). However, in nonpublic fora -- those which are not traditionally associated with speech activities and in which the government has a greater interest in managerial

control such as prisons and fairgrounds -- the Court gives wide deference to decisions to restrict speech absent viewpoint discrimination. See id. at 46-49. While there is room for disagreement regarding whether a forum should be deemed public or nonpublic and whether the Court has been wise to allow the government so much latitude in nonpublic fora, such issues are beyond the scope of this Article. For my purposes, the public forum doctrine's importance is that it attempts to assure that all speakers have some public outlet for speech and that it applies the other two organizing principles in public fora. Both are consistent with notions of Kantian autonomy as discussed further in this Part.

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Second, I do not assert that the Court has explicitly adopted Kantian autonomy as the basis of its doctrinal organizing principles. Other than Justice Brandeis's famous statement that "the final end of the State [is] to make men free to develop their faculties," n50 few Justices have explicitly invoked such a concept. n51 Indeed, other factors arguably contradict my [*172] argument. For example, several Justices have eschewed a jurisprudence based on Kantian autonomy. n52 In addition, to the extent the Court has adopted an autonomy rationale, it has been hopelessly inconsistent, sometimes viewing the First Amendment as protecting speakers' rights n53 and sometimes as protecting listeners' rights. n54

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n50 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

n51 Only Justice Douglas's dissenting opinion in Poe v. Ullman explicitly relies upon Kantian notions in the free speech context. See Poe v. Ullman, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting). A search for the term "Kant" in Westlaw's SCT and SCT-OLD databases, which contain Supreme Court cases released for publication from 1790 to the present, turned up seven other opinions which include citations to Immanuel Kant. See Morgan v. Illinois, 504 U.S. 719, 752 (1992) (Scalia, J., dissenting); Delaware v. Van Arsdall, 475 U.S. 673, 697 n.9 (1986) (Stevens, J., dissenting); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 665 n.41 (1985) (Stevens, J., dissenting); Bell v. Wolfish, 441 U.S. 520, 581 n.10 (1979) (Stevens, J., dissenting); Lindsey v. Normet, 405 U.S. 56, 68 n.14 (1972); Baker v. Carr, 369 U.S. 186, 261 n.11 (1962) (Clark, J., concurring); Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133, 134 (1915).

n52 Justice Holmes, for example, was no fan of Kant's political theory, instead arguing that the law should recognize that people act on "justifiable self-preference." OLIVER WENDELL HOLMES, THE COMMON LAW 41, 41-44 (1923); see also David M. Rabban, The Emergence of Modern First Amendment Doctrine, 50 U. CHI. L. REV. 1205, 1267-83 (1983) (discussing Justice Holmes's jurisprudence and his "disdain" of a Kantian rationale for the law). Indeed, Justice Holmes's reference to speakers as "poor and puny anonymities," even in his opinions arguing for protection of speech, implies far less respect for human dignity than a Kantian rationale. See Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting).

Of the current Court, Chief Justice Rehnquist is the most obvious anti-Kantian candidate. His willingness to uphold even the most paternalistic

regulations of speech, see, e.g., Rust v. Sullivan, 500 U.S. 173 (1991) (Rehnquist, C.J.) (upholding government regulation banning recipients of federal funds from counseling about the availability of abortion as a method of family planning); Posadas de P. R. Assocs. v. Tourism Co., 478 U.S. 328 (1986) (Rehnquist, C.J.) (upholding Puerto Rico statute banning casino advertising aimed at its citizens), is clearly inconsistent with a Kantian rationale. See Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1764 (1995) (arguing that Posadas and Rust are inconsistent with an autonomy rationale).

n53 See, e.g., Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("The concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("'It is a prized American privilege to speak one's mind.'") (quoting Bridges v. California, 314 U.S. 252, 270 (1941)); Kovacs v. Cooper, 336 U.S. 77, 80-81 (1949) (characterizing the right as the speaker's freedom to "express his views on matters which he considers to be of interest to himself and others").

n54 See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 791 n.31 (1978) ("The First Amendment rejects the 'highly paternalistic' approach of statutes . . . which restrict what the people may hear.") (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976)); Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 763-64 (1976) (noting the importance to the consumer of the "free flow of . . . information" regarding consumer drug prices); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (upholding access rules pertaining to broadcasters and noting that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount").

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But the Court's manifestation of Kantian autonomy does not lie in the Court's rhetoric or in the beliefs of independent Justices. My argument is that the Court's overall structural approach and reasoning when resolving [*173] free speech issues is remarkably consistent with a Kantian ideal. Moreover, explicit recognition of a relationship between Kantian autonomy and the Court's free speech jurisprudence might alleviate some of the Court's doctrinal and rhetorical inconsistencies. The remainder of this Part outlines the most critical aspects of free speech doctrine insofar as they relate to Kantian autonomy.

A. The Court's Distinction Between Content-Based and Content-Neutral Regulations of Speech

The Court's approach to content-based and content-neutral regulations of speech distinguishes between government regulations that "limit communication because of the message it conveys" n55 (content-based regulations) and government regulations that affect speech but are not aimed at its content (content-neutral regulations). n56 The Court heavily disfavors content-based regulations, striking them down unless the government can show that the law is narrowly drawn to meet a compelling state interest. n57 [*174] In contrast, the Court reviews content-neutral regulations under the more lenient standard of intermediate scrutiny, upholding the regulations as long as they "are

justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." n58 The differing treatment of content-neutral and content-based regulations and the differing standards applied to each reflect that aspect of Kantian autonomy that requires the State to respect our thought processes.

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n55 Stone, supra note 8, at 47. Such regulations often restrict the expression of a particular viewpoint (e.g., a law restricting only anti-abortion speech), but they may also regulate the discussion of entire subject matters, such as a law restricting all discussion of abortion in public places.

n56 Two primary forms of such content-neutral restrictions exist. First, laws may aim to regulate expression but do so in a way that has nothing to do with the message conveyed, such as a law banning the use of amplified sound-trucks in private residential areas). See Kovacs v. Cooper, 336 U.S. 77 (1949) (holding that the regulation of sound trucks was constitutional). Second, such laws may aim at regulating conduct but have an incidental effect on expression, such as a law banning the burning of draft cards. See United States v. O'Brien, 391 U.S. 367 (1968) (upholding conviction of defendant for burning his draft card on the grounds that the government's interest in assuring the continuing availabity of draft cards was sufficient to override defendant's claim that his act was protected as symbolic speech). Prior to the Court's decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that a National Park Service regulation prohibiting camping in certain parks did not violate the First Amendment, though applied to prohibit demonstrators from sleeping in a park where a permitted round-the-clock demonstration intended to call attention to the plight of the homeless was in progress), the two forms of content-neutral regulations were thought to be judged under different standards. The Court upheld regulations aimed directly at expression under a standard similar to the one enunciated in Clark. See United States v. Grace, 461 U.S. 171, 177 (1983) (noting that the Court will uphold time, place, and manner regulations of speech if they are "content-neutral, . . . narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication" (citing Perry Educ. Ass'n. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983))). The Court, however, upheld regulations aimed at conduct but incidentally affecting expression only if they were within the constitutional power of the government, furthered an important or substantial government interest that was unrelated to the suppression of free expression, and were no broader than essential to further the government interest. See, e.g., O'Brien, 391 U.S. at 377. In recent years, however, the Court has made clear that the Clark test applies in both situations. See Ward v. Rock Against Racism, 491 U.S. 781, 797-98 (1989). For criticism of the Court's current approach to content-neutral regulations, see Williams, supra note 49, at 636-54.

n57 See, e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (invalidating law requiring any entity contracting with a criminal to publish a depiction of the crime to turn over income under the contract to the Crime Victims Board); Widmar v. Vincent, 454 U.S. 263 (1981) (holding unconstitutional university regulation barring religious organizations from using university facilities for religious purposes); Police Dep't of Chicago v. Mosely, 408 U.S. 92 (1972) (invalidating law banning all picketing except labor picketing near schools).

n58 Clark, 468 U.S. at 293, quoted in Ward, 491 U.S. at 791; see also Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2523-24 (1994) (examining whether, in light of Clark, an injunction against anti-abortion protesters should be prohibited as motivated by a content-based purpose).

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The fact that content-based laws violate Kantian autonomy is best reflected in the purposes for which so many of those laws are enacted. n59 For example, the government often regulates speech because it does not trust individuals to make correct decisions if exposed to certain information. n60 Distrust of the ability of citizens to make decisions is antithetical to autonomy, n61 and the Court has invalidated numerous content-based laws that have such paternalistic justifications. n62 Also, government officials [*175] often justify content-based restrictions by arguing that they protect citizens from offensive speech, n63 under the premise that citizens ought not to have to deal with unpleasant or abhorrent words and ideas. Attempts to protect citizens from disagreeable speech treat adults as children and deny their capabilities to withstand or counter unpleasant events. Further, they allow those holding a dominant viewpoint in society to silence or restrict the dissemination of views with which they disagree, thereby making the government a vehicle for private citizens' disrespect for the thought processes of others. Not surprisingly, the Court has also found this justification wanting. n64 Finally, the government may enact content-based restrictions simply because it disapproves of the speaker's point of view. n65 Such restrictions amount to governmental attempts to substitute its thoughts for those of its citizens, in effect determining for us which views are right and wrong. Again, the Court has recognized that such justifications are illegitimate. n66 Thus, by protecting against the improper motivations generally underlying content-based regulations of speech, n67 the Court's doctrine reflects a consciousness of our inalienable dignity and a desire to protect this dignity from coercive government incursions.

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n59 See Williams, supra note 49, at 618 (noting that the Court and scholars alike believe that "the special danger in cases of content discrimination lies in the fact that the government's purpose is connected to the 'communicative impact' of the speech regulated").

n60 See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 748, 768 (1976) (dealing with State fear that information regarding drug prices might adversely influence consumer decision making); Whitney v. California, 274 U.S. 357, 371 (1927) (dealing with State fear that advocacy of communism would prompt people to attempt to overthrow the government).

n61 See Richard H. Fallon, Jr., Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn't Bark, 1994 SUP. CT. REV. 1, 31 [hereinafter Fallon, Harassment] ("To censor speech on the ground that the listener could not be trusted to evaluate its content would . . . affront the listener's autonomy in most cases."). Professor Fallon specifically bases his argument on what he calls "ascriptive" autonomy, id. at 30, a concept that he links directly to Kant. See Fallon, Autonomy, supra note 29, at 878. He further believes that "claims of ascriptive autonomy predominate in First Amendment doctrines dealing with the public forum, with governmental regulation of the traditional media,

and with people's use of their homes and similarly private facilities to express themselves uninhibitedly." Fallon, Harassment, supra at 36.

n62 See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 791-92 (1979) ("The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments . . . . If there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment."); Virginia Citizen's Consumer Council, 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us."); see also Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, 212 (1983) (noting that the Court has "long embraced an 'antipaternalistic' understanding of the first amendment").

n63 In Cohen v. California, California argued that it could "legitimately act . . . in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest." Cohen v. California, 403 U.S. 15, 21 (1971).

n64 See id. at 24, 26 (reversing defendant's conviction for disturbing the peace based upon his wearing a jacket with a "Fuck the Draft" logo).

n65 See, e.g., Texas v. Johnson, 491 U.S. 397, 410 (1989) (discussing statute banning flag desecration in circumstances where the State believed "such conduct will lead people to believe that the flag does not stand for nationhood . . . or that the concepts reflected in the flag do not in fact exist"); Abrams v. United States, 250 U.S. 616, 617 (1919) (discussing federal statute prohibiting citizens from provoking or encouraging resistance toward the United States).

n66 See, e.g., Johnson, 491 U.S. at 418 (striking down Texas's flag-burning statute); Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 544 (1980) (striking down law prohibiting public utilities from using monthly bill inserts addressing "controversial issues of public policy").

n67 The government obviously does not enact all content-based laws with improper motives. However, the likelihood of such motives has led the Court to require compelling justifications for all content-based regulations. Erecting a wall around speech in order to protect the integrity of our thought processes is consistent with a Kantian autonomy rationale. I disagree with Professor Stone who, while recognizing the strong distrust of government running through the Court's free speech jurisprudence, specifically eschews an autonomy rationale with respect to that distrust. See Stone, supra note 1, at 1173.

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The Court's more lenient approach to content-neutral standards similarly fits within a Kantian autonomy rationale, as such restrictions do not usually impinge upon our innate dignity in the same manner as content-based limitations. Improper government motivation is less of a danger with content-neutral restrictions because, by definition, these regulations [*176] must be justified without reference to the content of expression. In the context of a law regulating the decibel levels of sound trucks, for example, such a justification might be that trucks blaring their messages in private residential neighborhoods are significant invasions of privacy. n68 That justification is

relatively neutral, applies to all speech regardless of its message, and leaves open other opportunities of expression. Thus, the government does not appear to be regulating speech in a manner designed to coerce our thought processes. n69 Of course, ostensibly impartial justifications for content-neutral regulations can be pretextual: the government's real motive behind the law could be disapproval of the speaker's viewpoint. n70 Nevertheless, much of the time, the government's neutral justifications are legitimate efforts to balance expression with other important concerns, such as order or privacy. Furthermore, the Court does not merely rubber stamp content-neutral laws but applies intermediate scrutiny in order to ensure that content-neutral laws do not suppress speech inappropriately. To the extent that content-neutral regulations have a severe impact on viewpoints or speakers, the Court has been willing to strike down such regulations. n71

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n68 See Kovacs v. Cooper, 336 U.S. 77, 81 (1949) (stating that purpose of ordinance banning use of sound trucks was to protect people from unreasonable noise and interference while in the privacy of their homes or businesses).

n69 Content-neutral regulations may have a much greater impact on the total quantity of speech than content-based regulations because they have the potential to restrict the free flow of information far more than restrictions on a single viewpoint. Thus, one could argue that such restrictions should be at least as disfavored as content-based restrictions. See Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 STAN. L. REV. 113, 128 (1981). From the perspective of Kantian autonomy, however, such an impact is less of a problem than government attempts to impose its will upon its citizens, as is the case with content-based restrictions. Thus, content-neutral regulations are properly reviewed under a lesser standard. Moreover, the Court has shown a willingness to strike down even content-neutral laws that severely limit communication. See, e.g., City of Ladue v. Gilleo, 114 S. Ct. 2038 (1994) (striking down law banning homeowners from displaying signs on their property); see also Stone, supra note 61, at 190 & n.5 (discussing cases in which the Court has found content-neutral laws unconstitutional because of the severe restriction on communication). In this sense, the Court's jurisprudence is consistent with the Kantian desire to ensure some public exercise of reason. See supra notes 43-44 and accompanying text.

n70 In United States v. O'Brien, 391 U.S. 367 (1968), for example, it appeared that the legislature's motives in criminalizing draft card burning were far less related to the ostensible goal of maintaining easy administration of the selective service system than they were to "putting a stop to [a] particular form of antiwar protest, which [Congress] deemed extraordinarily contemptible and vicious." Dean A. Alfange, Jr., The Draft-Card Burning Case, 1968 SUP. CT. REV. 1, 15.

n71 See, e.g., Martin v. City of Struthers, 319 U.S. 141, 143, 146-47 (1943) (striking down municipal ban on distribution of door-to-door circulars because the method of distribution was essential to poorly financed and often unpopular causes); see also Stone, supra note 8, at 81-86 (discussing the Court's approach to cases in which viewpoints are negatively impacted by content-neutral regulations).

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Thus, the Court's approach to content discrimination is consistent with the Kantian desire to ensure the integrity of thought processes integral [*177] to our capacity for autonomy. The Court's approach to content-based and content-neutral regulations, however, reflects only one aspect of Kantian autonomy -- protection from State interference with our thought processes. One sees the other aspect of Kantian autonomy -- regulating private citizens' attempted coercion of our thought processes -- in the Court's approach to low-value speech.

B. The Court's Approach to Low-Value Speech

Although its First Amendment jurisprudence is generally protective of speech, the Court has never assumed that all speech is of equal value. Instead, the Court has created certain categories of low-value speech that it believes deserve less protection than other speech. Examples of such low-value speech are: speech that incites unlawful activity; fighting words; obscenity; and, to some extent, commercial speech and libel. Unfortunately, the Court has provided little guidance with respect to what speech should be considered low-value. n72 Its only consistent statement is that low-value speech is "no essential part of any exposition of ideas and is of such slight social value as a step to the truth that any benefit that may be derived from it is clearly outweighed by the social interest in order and morality." n73 That statement, although explaining why the Court has created categories of low-value speech, does not explain when speech falls into those categories. Not surprisingly, scholars have widely criticized the Court for creating low-value categories which many believe have no place in First Amendment jurisprudence. n74 In addition, the Court's failure to [*178] define specifically when speech becomes low-value has engendered much debate over the salient characteristics of such speech. n75

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n72 See, e.g., SUNSTEIN, supra note 1, at 125 ("The Court has yet to offer anything like a clear principle to unify the categories of speech that it treats as 'low value.'"); Jeffrey M. Shaman, The Theory of Low-Value Speech, 48 SMU L. REV. 297, 334-35 (1995) (noting that the Court has never "explained what characteristics it considers in determining the value of speech"); Stone, supra note 61, at 194 (determining that "the precise factors" used by the Court to determine when speech is low-value "remain somewhat obscure").

n73 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1948). The Court's description of speech as having no social value first appeared with respect to its fighting words doctrine. However, the Chaplinsky language, or variants thereof, has appeared in almost all of the low-value speech cases. See, e.g., Roth v. United States, 354 U.S. 476, 484 (1957) ("Implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952) ("Libelous . . . utterances are no essential part of any exposition of ideas."); Valentine v. Chrestenson, 316 U.S. 52, 54 (1942) (noting that "purely commercial advertising" does not amount to the "exercise . . . of communicating information and disseminating opinion").

n74 See, e.g., THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 326 (1970) (arguing that the Court's approach to low-value speech is incompatible

with First Amendment principles); STEVEN SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 44 (1990) ("The very concept of low-value speech is an embarrassment to first amendment orthodoxy.") (footnote omitted); Kenneth L. Karst, Equality as a Central Principle in the First Amendment, 43 U. CHI. L. REV. 20, 31 (1975) (arguing that the Court's approach is "radically inconsistent with the principle of equal liberty of expression"). But see SUNSTEIN, supra note 1, at 126 ("Any well-functioning system of free expression must ultimately distinguish between different kinds of speech by reference to their centrality to the First Amendment guarantee."); Stone, supra note 61, at 195 n.24 ("The low value theory . . . is an essential concomitant of an effective system of free expression.").

n75 See, e.g., Larry Alexander, Low Value Speech, 83 NW. U. L. REV. 547, 554 (1989) (suggesting several alternative theories for the Court's value distinctions among types of speech); Shaman, supra note 71, at 333-37 (discussing Court's approach to low-value speech and commentators' attempts to make sense of it); Cass R. Sunstein, Pornography and the First Amendment, 1986 DUKE L.J. 589, 603-04 (setting forth four-factor analysis for determining when speech is low-value).

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Despite scholars' concerns, there is a unifying principle to the Court's low-value speech analysis that also illuminates its legitimate place in free speech jurisprudence. A close examination of the Court's approach to the various categories of low-value speech reveals that it is consistent with a Kantian notion of autonomy. Specifically, the Court has attempted to carve out as low-value speech that disrespects other citizens' thought processes, thus making it a proper subject for State regulation. n76 Furthermore, and consistent with Kantian autonomy, the Court has made a strong effort to limit State regulation only to speech that invades rather than appeals to our rationality. The remainder of this Part examines the Court's doctrine in five specific areas of low-value speech: incitement of illegal action; fighting words; obscenity; libel; and commercial speech.

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n76 Few, if any, scholars have maintained that an autonomy rationale underlies the Court's low-value speech jurisprudence. Indeed, given the Court's rhetoric regarding "order and morality," I suspect that many scholars would agree with Professor Sunstein's statement that "any autonomy-based approach would make it difficult or impossible to distinguish between different categories of speech." Sunstein, supra note 4, at 303 (footnote omitted). However, at least two scholars argue that some government regulation of private speakers is consistent with an autonomy rationale, although not necessarily with a Kantian one. Professor Strauss argues that under an autonomy rationale one can regulate some coercive or manipulative speech. Strauss, supra note 1, at 362-68. Professor Baker similarly recognizes that an autonomy rationale may allow regulation of coercive speech. C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 55-56 (1989).

Both scholars' theories differ from mine. Professor Strauss, although arguing that we should be able to regulate some coercive and manipulative speech in the name of autonomy, apparently does not believe that the Court's current low-value speech jurisprudence is firmly grounded in such a rationale. Strauss, supra

note 1, at 361-63 (noting libertarian bias of Court's "persuasion principle" and suggesting alterations to allow regulation of private, coercive speech). Professor Baker, although arguing that coercive speech can be regulated consistent with an autonomy rationale, nevertheless appears to characterize autonomy largely as a speaker's right. BAKER, supra, at 54, 59 ("To the extent that speech is involuntary, is not chosen by the speaker, the speech act does not involve the self-realization or self-fulfillment of the speaker . . . . [Respect for autonomy] is belied unless each person has a right to decide on and employ speech . . . for realizing substantive values and visions.").

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[*179] 1. Incitement of Illegal Action

The Court's doctrine regarding incitement provides an excellent illustration of the autonomy rationale in its low-value speech jurisprudence. According to the Court, the government can suppress speech advocating unlawful conduct only if "it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"; n77 mere "abstract teaching" of the moral necessity of such action will not sustain punishment. n78 For example, the State may punish speech designed to whip an angry mob into a violent and destructive frenzy, but it may not punish a political rally in which the speaker advocates violence as a tool for revolution.

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n77 Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (striking down Ohio criminal syndicalism statute); see also Hess v. Indiana, 414 U.S. 105, 108 (1973) (reversing conviction for disorderly conduct because defendant's statements at an antiwar rally were "nothing more than advocacy of illegal action at some indefinite future time"); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (reversing conviction for threatening President because defendant's words were merely "a kind of very crude offensive method of stating a political opposition to the President").

n78 Id.

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The Court's requirement of imminent lawless action is easily justified as based upon concern for autonomy. Speech designed to incite immediate violence or lawless action does not appeal to our thought processes. n79 Rather, it disrespects our rationality and is designed to elicit an unthinking, animalistic response. n80 Thus, the Court's test protects our collective thought processes and imposes consequences on speakers who violate the freedom of citizens to think rationally. Acceptable state action, however, does not include punishing mere advocacy of unlawful action. Speech designed to persuade people to violate the law is not coercive in the same sense as speech designed to incite imminent lawlessness; the former contributes to rather than detracts from our deliberative processes, even if the idea advocated is perceived as undesirable. Punishment of such speech is an unreasonable impediment to our public exercise of reason, as the Court has recognized numerous times. n81 Thus, the Court's incitement [*180] doctrine maintains a narrow line to protect our rationality from both private and state interference.

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n79 The distinction between coercive and persuasive speech is not easily drawn and defining such a distinction is well beyond the scope of this Article. That the Court believes the distinction can be made, however, supports my argument that its jurisprudence is consistent with Kantian autonomy. For a view on when speech is coercive, see BAKER, supra note 75, at 54-69.

n80 See Strauss, supra note 1, at 339 (arguing that speech inciting imminent lawless action "bypass[es] the rational processes of deliberation"). Judge Learned Hand originally made the distinction between incitement, which is a "trigger[] of action," and advocacy, which is a "key[] of persuasion." Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), rev'd, 246 F. 24 (2d Cir. 1917).

n81 See, e.g., Hess, 414 U.S. at 108; Watts, 394 U.S. at 708; Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y., 360 U.S. 684, 685 (1959) (striking down state law requiring the denial of licenses to show films which portray "acts of sexual immorality . . . as desirable").

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2. Fighting Words

One can view the Court's approach to fighting words -- "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" n82 -- in the same vein. In the Court's eyes, such words do "not in any proper sense communicate . . . information or opinion"; n83 rather, they are more akin to physical assaults. n84 As such, fighting words do not appeal to our rational or deliberative capacities. They are instead designed to induce us to react violently and without thinking, much as a punch in the mouth induces the victim to respond in an unthinking manner.

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n82 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

n83 Id. (quoting Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940)).

n84 See id. (characterizing fighting words as "personal abuse"); see also David S. Bogen, The Supreme Court's Interpretation of the Guarantee of Freedom of Speech, 35 MD. L. REV. 555, 588 (1976) (noting that fighting words are "similar in nature to a physical attack").

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The fact that the Court refuses to consider offensive speech as being low in value further bolsters the autonomy rationale argument. In order to qualify as fighting words, speech must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." n85 The State cannot ban speech that does not rise to this level simply because people are offended or angered by the ideas expressed. n86 Distasteful or abhorrent speech, while often unpleasant or even painful, does not coerce or manipulate others to react in an immediately violent or irrational manner. In fact, offensive speech often expresses emotions that persuade others regarding the speaker's point of view

n87 or at least invite debate. n88 Thus, as with its incitement doctrine, the Court has attempted to distinguish between speech that invades the dignity of others, for which the speaker must bear the consequences, and speech that must be free from state interference in order to protect our thought processes from state coercion.

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n85 Gooding v. Wilson, 405 U.S. 518, 523 (1972); see also City of Houston v. Hill, 482 U.S. 451, 461-62 (1987).

n86 See Texas v. Johnson, 491 U.S. 397, 418 (1989) (striking down Texas law prohibiting defacement of the flag in a manner that would "seriously offend" other persons); Cohen v. California, 403 U.S. 15, 26 (1971) (refusing to uphold defendant's breach of peace conviction based upon the offensiveness of "Fuck the Draft" logo).

n87 See Cohen, 403 U.S. at 25-26; see also Strauss, supra note 1, at 342-43 (noting that offensive speech may be persuasive and discussing limits on government regulation of such speech).

n88 See Johnson, 491 U.S. at 408-09 ("Our precedents . . . recognize that a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'") (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

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[*181] 3. Obscenity

The Court's obscenity doctrine is also consistent with Kantian autonomy. In Roth v. United States, n89 the Court held that obscenity did not enjoy First Amendment protection because it is "utterly without redeeming social importance." n90 In so holding, the Court defined obscenity as "material which deals with sex in a manner appealing to prurient interest." n91 Significantly, the Roth Court took great pains to distinguish obscenity from portrayals of sex expressing "ideas having even the slightest redeeming social importance," n92 including unorthodox, controversial, or hateful ideas, which the Court believed should enjoy full constitutional protection. By requiring that obscene material have a "prurient" appeal, the Court's jurisprudence targets expression that is intended to appeal to our physical rather than our mental capacities, just as fighting words are like a physical assault rather than speech. n93 The Court's attempt to distinguish speech that disrespects our thought processes from sexually oriented speech that nevertheless appeals to our rational nature is analogous to the Court's line drawing with incitement and fighting words. Both distinctions allow the State to protect against and punish private interference with our deliberative capacities while still maintaining unfettered dialogue, even on topics that some might find uncomfortable.

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n89 354 U.S. 476 (1957).

n90 Id. at 484.

n91 Id. at 487. The Court has since refined the Roth standard. Currently, it defines obscenity as that material which appeals to a prurient interest, depicts sexual conduct in a patently offensive manner, and lacks serious, redeeming social value. See Miller v. California, 413 U.S. 15, 24 (1973).

n92 Roth, 354 U.S. at 484.

n93 See EMERSON, supra note 74, at 496 (noting that an obscene communication "imposed upon a person contrary to his wishes, has all the characteristics of a physical assault"); Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 625 (1990) (noting the similarity of the "prurient interest" and "fighting words" standards in the Court's determination that speech is low-value); Frederick Schauer, Speech and "Speech" -- Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language, 67 GEO. L.J. 899, 926 (1979) (arguing that, by definition, obscenity "is sex" and not speech).

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Claiming that the Court's approach to obscenity is consistent with Kantian autonomy is not without controversy. Three potential counterarguments are especially important in that respect. First, many scholars contend that the Court's determination that obscenity has no value actually violates our autonomy by imposing a dominant viewpoint regarding acceptable lifestyles. n94 Like these scholars, I find troubling the notion that [*182] obscenity is worthless, but the debate over obscenity's actual value is beyond the scope of this Article. The important fact is that the Court has attempted to carve out only a small portion of material for suppression based upon its belief that such information invades our thought processes. Most sexually oriented speech remains untouched. In fact, the Court has gone out of its way to protect such speech when it believes the government to be engaging in unreasonable censorship. n95 Thus, regardless of whether obscenity actually is valueless, the Court's reasoning is consistent with a Kantian notion of autonomy.

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n94 See, e.g., Steven G. Gey, The Apologetics of Suppression: The Regulation of Pornography as Act and Idea, 86 MICH. L. REV. 1564, 1565 (1988) (criticizing suppression of obscenity as based in "moralistic paternalism") (citing J. FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 189 (1985)); Michael J. Perry, Freedom of Expression: An Essay on Theory and Doctrine, 78 NW. U. L. REV. 1137, 1182 (1983) (noting that "obscene pornography constitutes a political-moral vision"); David A.J. Richards, Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment, 123 U. PA. L. REV. 45, 82 (1974) (noting that there "is no reason whatsoever to believe that the freedom to determine the sexual contents of one's communications or to be an audience to such communications is not as fundamental to . . . self-mastery as the freedom to decide upon any other communicative contents").

n95 American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986) (striking down as viewpoint discrimination an antipornography ordinance banning graphic and sexually explicit portrayals of

women as inferiors or subordinates).

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Second, one could argue that the Court's current standard for judging obscenity belies my argument regarding Kantian autonomy. While the Roth standard characterized obscenity as without social value, n96 current doctrine defines obscenity as that material which appeals to a "prurient" interest and that merely lacks "serious" social value. n97 Thus, one could conclude that the Court's current obscenity jurisprudence is not limited to speech which invades our thought processes. While the Court appears to have relaxed its standard regarding social value, its maintenance of the "prurient" interest requirement in both definitions nevertheless suggests that it is at least trying to limit state regulation to speech that in some way coerces or disrespects our rationality.

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n96 See supra note 88 and accompanying text.

n97 See supra note 91.

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Finally, one could argue that the Court's heavy reliance on history and accepted social practice n98 in formulating its obscenity doctrine is inconsistent with an autonomy rationale. To be sure, history played a large role in the Court's decision not to accord obscenity First Amendment protection. But the Court's modern definition clearly deviates from historical definitions of obscenity, which encompassed far more literature, art, and other useful information than the Court's current definition. n99 [*183] Thus, the Court's attempt to narrow the definition of obscenity to that which has a "prurient" appeal, although influenced by history, is at least partly compatible with autonomy concerns.

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n98 In ruling that obscenity was "outside the protection intended for speech and press," the Roth Court relied heavily on the fact that obscenity was illegal in most states at the time Congress ratified the Constitution. Roth, 354 U.S. at 483. For a more thorough review of the treatment of obscenity throughout history, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW @ 12-16, at 904-08 (2d ed. 1988).

n99 See, e.g., United States v. One Book Entitled Ulysses, 72 F.2d 705, 709 (1934) (Manton, J., dissenting) ("Who can doubt the obscenity of [Joyce's classic novel?] . . . The test of obscenity . . . is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands a publication of this sort may fall."). Professor Rabban has noted that contemporary judges expansively interpreted the term "obscene" to include materials "opposing legal regulation of marriage and . . . providing sexually explicit information about contraception." David M. Rabban, The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in american History, 45 STAN. L. REV. 47, 53 (1992). Indeed, Anthony Comstock, the father of an act which prohibited using the interstate mails to

deliver "obscene" materials, made no distinction between "commercial pornography and serious works about sex by libertarian radicals who expressed controversial views." Id. at 58.

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4. Libel

Although the Court originally maintained that "libelous . . . utterances are no essential part of any exposition of ideas," n100 it currently gives substantial protection to false statements of fact regarding public officials and public figures. n101 The Court's extension of First Amendment protection to such statements, however, had little to do with a belief that they have any value as speech. Indeed, the Court has explicitly stated that such statements have little, if any, First Amendment value. n102 Rather, the desire to avoid chilling potential speakers by building a protective wall around speech on public issues, especially criticism of the government, largely drove the Court's decisions. n103 Such reasoning is consistent with a Kantian view of autonomy.

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n100 Beauharnais v. Illinois, 343 U.S. 250, 256-57 (1952).

n101 See New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (holding that First Amendment requires public official seeking damages for libel prove that statement was made "with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not"); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (plurality opinion) (holding that Sullivan standard applies only to "speech on 'matters of public concern'") (citations omitted); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-43 (1974) (applying Sullivan standard to false statement of facts made about public figures).

n102 The Sullivan Court originally intimated that false statements of fact have some value. See Sullivan, 376 U.S. at 279 n.19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'") (citations omitted). In later cases, however, the Court retreated from this statement to hold that libelous statements have little or no value. See, e.g., Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) ("False statements of fact are particularly valueless . . . ."); Gertz, 418 U.S. at 340 ("There is no constitutional value in false statements of fact.").

n103 See Hustler, 485 U.S. at 52 (noting that the Court's actual malice rule provides "breathing space" for free expression); Sullivan, 376 U.S. at 279 (discussing the fear that strict libel laws would deter true speech as well as false statements of fact).

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The Court's decision that libelous utterances are valueless protects our thought processes from private coercion. As Professor Strauss has noted:

[*184] Lying is the clearest case of . . . coercion-like, autonomy-invading manipulation . . . . When a speaker tells a lie in order to influence the

listener's behavior, the metaphor of commandeering the listener's mind, and making it serve the speaker's ends instead of the listener's, seems especially appropriate. The speaker really does inject her own false information into the thought processes of the listener for the purpose of making those processes produce the outcome that the speaker desires. n104

In other words, false statements of fact are designed not to persuade or appeal to our rational senses but to override them and unreasonably damage the libeled person's reputation as a result. n105 Consequently, we can hold persons making those statements responsible for such invasions.

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n104 Strauss, supra note 1, at 366.

n105 In this way, libelous utterances are similar to fighting words. See TRIBE, supra note 98, @ 12-12, at 861 (noting that "libelous speech [has long been] regarded as a form of personal assault"). Professor Post comes to a similar conclusion noting that defamatory communications violate what he calls the "rules of civility" because they "threaten . . . the self of the defamed person (causing, among other things, symptoms of 'personal humiliation, and mental anguish and suffering')." Post, supra note 93, at 618 (quoting Gertz, 418 U.S. at 350).

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Some might argue, however, that the Court's refusal to extend protection of defamation law to public figures and officials except in extreme circumstances argues against an autonomy rationale. After all, if lies invade our thought processes, why should lies about public officials and figures be any different? The answer rests in the issue of seditious libel that played an important role in Sullivan. n106 In that case, an Alabama official used libel law not to protect a personal reputation but to shut down criticism of the government by members of the civil rights movement. n107 In such a circumstance, libel law did not protect autonomy from invasion by private citizens but became a tool of the government to suppress speech that it disliked. Recognizing the dangers of such misuse and its chilling effect on speech, n108 the Court established its requirement that public officials show actual malice n109 before recovering damages. n110 Thus, one can view the actual malice standard as the Court's attempt to walk the same fine line it has walked in other low-value speech areas. It [*185] attempts to preserve our deliberative capacities from invasive lies by imposing liability for such lies but also seeks to keep the government from suppressing disagreeable speech. n111

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n106 New York Times v. Sullivan, 376 U.S. 254 (1964).

n107 See id.; see also ANTHONY LEWIS, MAKE NO LAW 5-45 (1991) (reviewing the social and historical context in which the Sullivan case arose); TRIBE, supra note 98, @ 12-12, at 863 ("The inescapable conclusion [in light of Sullivan's lawsuit] was that Alabama's 'white establishment' had taken the opportunity to punish The New York Times for its support of civil rights activists: the South was prepared to use the law of libel to stifle black opposition to racial segregation.").

n108 See Sullivan, 376 U.S. at 276-79.

n109 The Court defined "actual malice" as statements made with knowledge or reckless disregard of their falsity. See id. at 280.

n110 See id. at 279-80.

n111 The extension of the actual malice standard to public figures is somewhat problematic in this respect. Public figures clearly do not pose the same danger with respect to seditious libel as do public officials. In addition, the Court has been inconsistent in applying its rationale in such cases. Originally, at least one member of the Court based his extension of the actual malice standard to public figures partly on the notion that "increasingly in this country, the distinctions between governmental and private sectors are blurred" and that public figures, while not holding office, are "nevertheless intimately involved in the resolution of important public questions." Curtis Publishing Co. v. Butts, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring). In more recent years, however, the Court has based its extension on other rationales: the ability of public figures to defend themselves against libelous statements and the voluntary nature of their participation in public issues. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974). Even here, though, the Court has noted that "public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Id. at 345 (emphasis added). One could conclude, then, that even with public figures, the Court is concerned with a powerful group of people attempting to suppress newsworthy speech with which they disagree.

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5. Commercial Speech

As with libel, commercial speech n112 was once thought to have no value n113 but now enjoys substantial First Amendment protection. n114 Insofar as Kantian autonomy is concerned, the Court's decisions are directly aimed at State coercion of our thought processes. Indeed, antipathy to-ward State paternalism has been a central focus of the Court's commercial speech decisions. n115 Yet there is also an element of protecting our thought processes from private coercion. The Court has made it clear that States are free to regulate false, misleading, and deceptive advertising, stressing [*186] that "untruthful speech, commercial or otherwise has never been protected for its own sake." n116 As with libelous statements, the Court's pronouncement reflects a desire to protect against invasive lies and deception that attempt to override rather than appeal to our thought processes. As with other areas of low-value speech, however, the Court has drawn a line between acceptable government regulation of lies and unacceptable attempts to regulate thoughts.

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n112 The Court generally defines commercial speech as that which does "no more than propose a commercial transaction." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976) (quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973)).

n113 See Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).